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Supreme Court, U.S.
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No. 04-155

IN THE

Supreme Court of the United States

ORRIE TUCKER AND CATHERINE TUCKER,

Petitioners,

v.

METROWEST MEDICAL CENTER, F/K/A FRAMINGHAM UNION HOSPITAL, AND WILLIAM S. GEORGE, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF WILLIAM S. GEORGE, M.D.

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Dated: September 1, 2004

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QUESTION PRESENTED

Whether this Court has jurisdiction to grant certiorari where Petitioners did not squarely present their federal issues to the Massachusetts state courts and where there exists an independent state procedural ground barring this Court's consideration of the federal claims Petitioners now attempt to raise.

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STATEMENT ON JURISDICTION

Although Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a), this Court lacks jurisdiction because Petitioners' purported federal claims were never addressed by, or properly presented to, the state courts below. The first time that a federal claim was squarely presented was in Petitioners' Petition for Writ of Certiorari to this Court. This Court's jurisdiction to reexamine the final judgment of a state court can arise only if the record as a whole shows, either expressly or by clear implication, that the federal claims were adequately preserved in the state system. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). For the reasons set forth below, Petitioner's federal claims were not adequately preserved, and hence this Court is without jurisdiction.[1]

STATEMENT OF THE CASE

Because the Petition omits certain aspects of the procedural history necessary to obtain an accurate understanding of this matter, Respondent briefly sets forth below additional facts and procedural background.

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[1] This Court has made clear that "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). Because there was an adequate and independent ground for the Massachusetts' courts' decisions, the request for certiorari must be denied.

Following the Massachusetts Superior Court's dismissal of Petitioners' complaint and entry of judgment in Respondent's favor, Petitioner's counsel filed a "Motion for Reconsideration" pursuant to Mass. R. Civ. P. 60(b)(6).[2] (*See* Appendix ("App.") 1a-7a.) [3] Nowhere in Petitioners' Motion was an argument advanced that the Superior Court's dismissal violated Petitioners' federal rights, nor was there any mention, even in passing, of a claim that failure to grant relief would be inconsistent with "due process." Not surprisingly then, the Superior Court's Memorandum and Order denying the Motion for Reconsideration was silent on the issue of any potential federal claim. (App. 8a-9a.)

Soon thereafter, Petitioners filed a "Second Motion for Reconsideration" with the Superior Court. Again, the Second Motion invoked the "extraordinary circumstances" provision of Mass. R. Civ. P. 60(b)(6) as the basis for the Motion. (App. 10a.) And, again, the Second Motion made no mention whatsoever of any potential violation of Petitioners' federal rights. (App. 10a-17a.) The Superior Court summarily denied plaintiffs' Second Motion (App. 18a-19a), and Petitioners appealed to the Massachusetts Appeals Court.

In their brief filed with the Appeals Court, Petitioners framed the "Issue Presented For Review" *solely* as:

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[2] The text of Mass. R. Civ. P. Rule 60, entitled "Relief From Judgment or Order," is set forth at pp. 3-4 of the Petition. Subsection (b)(6) permits relief from a judgment for "any other reason justifying relief from the operation of the judgment." *See id.*

[3] Unless otherwise noted, references to the "Appendix" are to the Appendix attached hereto.

> Whether the trial court abused its discretion and erred as a matter of law in entering Final Judgment and dismissing the Plaintiffs' Complaint for Failure to Post the Increased Bond and thereafter denying the Plaintiffs' First and Second Motion for Reconsideration?

(App. 24a.) Missing entirely from the "Issue Presented," then, was any mention of a perceived violation of any federal right, nor was any federal statute or constitutional provision set forth in the brief's Table of Authorities. (App. 22a-23a.) The *only* mention of any federal right is (arguably) located in the title of Section C. of Petitioners' Brief ("The Dismissal of the Complaint was Unconstitutional and Unjustly Penalized the Plaintiffs"), although even that portion of the brief focused upon the constitutionality (under the Massachusetts Declaration of Rights) of the state statutory scheme requiring plaintiffs to pay a bond before proceeding with their personal injury claim. (*See* App. 41a-51a; *id.* at 50a. ("The question then becomes, are these fees constitutional or do they violate Article 11, Article 15 and/or Article 30 of the Massachusetts Declaration of Rights and by extension the comparable rights guaranteed under the United States Constitution. We present this issue to the Court for resolution").) [4]

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[4] The issue of the constitutionality of the fees established by the state statutory scheme is *not* included in the "Questions Presented" set forth by Petitioners in their Petition to this Court. (*See* Petition at i.) Rather, Petitioners argue that it was inconsistent with "due process" for their claims to be dismissed (and their motions for relief from judgment to be denied) on the basis of their attorney's conduct. Nor did the appellate brief raise at any point an argument concerning — or even include a citation to — Rule 60(b) (although they discuss that provision extensively in their Petition to this Court).

It must be noted that the Petition mischaracterizes the nature of the arguments Petitioners advanced in their written submission to the Massachusetts Appeals Court. Petitioners claim that their Brief urged:

> that [the] procedural scenario which resulted in the dismissal of their complaint for the *egregious misconduct of their counsel* in failing to pay timely the bond as ordered deprived them of due process and the equal protection of the laws as guaranteed them by the federal constitution.

Petition at 9 (emphasis added). In fact, the Brief attempted to defend the conduct of the Petitioner's counsel before the Superior Court (App. 42a-43a), describing counsel's delay as "excusable."[5] (App. 43a.) Thus, in addition to receiving no argument on the issue of Petitioner's counsel's allegedly "egregious misconduct," the Appeals Court was not properly presented with any federal claims whatsoever. It is not surprising, therefore, that the Appeals Court's summary, unpublished affirmance of the Superior Court's decision does not even mention any purported federal claims.[6] (Petitioners' Appendix at 2a-6a.)

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[5] The distinction is important because a claim of "excusable neglect" is governed by Mass. R. Civ. P. 60(b)(1), not (b)(6). Thus, if anything, the Petitioners urged the Appeals Court to consider counsel's actions in light of the "excusable neglect" standard, rather than the "extraordinary circumstances" exception of (b)(6), which is the statutory provision upon which they rely in their Petition.

[6] Petitioners misleadingly attempt to suggest that their purported federal claims were properly presented to the Appeals Court by cobbling together snippets from their 43-page appellate brief into three pages of their Appendix. (*See* Petitioners' Appendix

(continued...)

Petitioners next applied to the Supreme Judicial Court ("SJC") of Massachusetts for further appellate review. (App. 53a.) It was at this point that Petitioners shifted gears and argued, for the first time, that their prior counsel had been engaged in "egregious conduct" and "gross neglect." (App. 64a.) As in their brief to the intermediate appellate court, Petitioner's Table of Authorities to the SJC included no citation to any federal constitutional or statutory provision whatsoever (App. 55a-57a), nor did their "Statement of the Issues of Law For Which Further Appellate Review is Sought" allude to any federal claim:

> 1. Should [Petitioners] be punished by the most severe sanction of dismissal of their claims with prejudice for their attorney's egregious conduct in failing to secure the increased bond in a timely manner and in failing to produce the expert's letter when ordered to do so where they never knew about, condoned or otherwise approved of [predecessor counsel's] gross neglect?

(..continued)

at 13a-15a.) This Court has made it clear, however, that "passing invocations of 'due process'" and merely mentioning "a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim." *Adams v. Robertson*, 520 U.S. 83, 88, 89 n.3 (1997); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987). In order to present this Court with an accurate picture Petitioners' failure to present their purported federal claims, Respondent includes the entirety of Petitioner's appellate brief at App. 20a-52a.

> 2. Did [the Superior Court judge] abuse his discretion in denying [Petitioners'] first motion for reconsideration where [Petitioners] never knew about, condoned, or approved of [predecessor counsel's] gross neglect?
>
> 3. Did [the Superior Court judge] abuse his discretion in denying [Petitioners'] second motion for reconsideration brought by successor counsel where [Petitioners] never knew about, condoned or approved of their former attorney's inexcusable and gross neglect and where it was shown that [predecessor counsel] has withdrawn her appearance for [Petitioners]?

(App. 64a.) Far from advancing a purported federal "due process" claim, the phrase "due process" appeared *nowhere* in Petitioners' 26-page request for further appellate review to the SJC.[7] The SJC denied

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[7] The only federal authorities cited whatsoever in their petition to the SJC consisted of a handful of federal circuit court opinions that Petitioners characterized as "persuasive federal precedents directly addressing the effect of an attorney's gross neglect in the prosecution of a civil action." (App. 68a-69a.) The utter absence of argument concerning federal rights in the petition for further appellate review is demonstrated by the fact that Petitioners do not even include *any* excerpt from that filing in the Appendix to their Petition. For the convenience of the Court, Respondent includes a copy of Petitioners' application to the SJC at App. 53a-71a. Even a cursory review of the petition for further appellate review demonstrates the falsity of Petitioners' claim (at page 11 of their Petition) that they argued to the SJC that "there [was] no justifiable reason in law to impute such egregious conduct [by counsel] to the party and thereby deprive them *unconstitutionally* of their day in court on their legitimate claims." (Emphasis added.)

the request for further review, and the instant Petition was filed.

REASONS FOR DENYING THE PETITION

I. Petitioners Did Not Present Their Purported Federal Claims At The Time Or In The Manner Required.

In support of a Petition requesting relief pursuant to 28 U.S.C. § 1257(a), a Petitioner bears the burden of demonstrating that "the federal question was timely and properly raised" before the state courts such that "this Court has jurisdiction to review the judgment on a writ of certiorari." Sup. Ct. R. 14.1(g)(i); *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Because Petitioners failed timely and properly to raise their purported federal claims before the Massachusetts courts, their Petition must be denied.

This Court has "consistently refused to decide federal constitutional issues raised [before this Court] for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Moore v. Illinois*, 408 U.S. 786, 799 (1972). Thus, federal claims must be "either addressed by, or properly presented to, the state court that rendered the decision" this Court has been asked to review. *Adams*, 520 U.S. at 86. When the highest state court is silent on a federal question before this Court — as the Supreme Judicial Court of Massachusetts was in its denial of Petitioners' request for further appellate review — this Court assumes that the federal claim was not properly presented to the state court, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and a petitioner bears the burden of defeating this assumption. *Id.* Petitioners may satisfy this requirement if they (i) establish that

the federal claim was raised "at the time and in the manner required by the state law," *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); (ii) demonstrate that the state procedural rule could not serve as an independent and adequate state law ground for the state court's judgment; or (iii) demonstrate that they presented the particular claim at issue before this Court with "fair precision and in due time" to the state courts. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). *See also Adams*, 520 U.S. at 87. Petitioners can satisfy none of these standards.

As noted *supra*, neither the statement of "Issue[s] Presented For Review" filed with the Massachusetts Appeals Court nor the "Statement of the Issues of Law For Which Further Appellate Review is Sought" filed with the Supreme Judicial Court of Massachusetts included any mention of any actual or potential federal claim. Nor were the elements of a federal "due process" claim even mentioned, let alone developed, in any appellate submission. (*See generally* App. 20a-71a.) Principles of comity in our federal system require that the state courts be given an opportunity to respond to attacks on state authority based upon federal law. *Webb v. Webb*, 451 U.S. 493, 499 (1981). The Massachusetts courts were given no such opportunity.

This Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.* at 125-26. Thus, jurisdiction before the Court is presumed to exist only if it is not clear that the state court relied on independent and adequate state grounds, and when it

fairly appears that the state court rested its decision primarily on federal law. *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Even a cursory review of the opinions below reveals that *none* of the Massachusetts courts' decisions in this matter can possibly be categorized as resting primarily upon federal law. (*See* Petitioners' App. at 2a-12a.)

Like most jurisdictions, Massachusetts appellate courts will not, as a general rule, address issues raised for the first time on appeal. *E.g.*, *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Commission*, 434 N.E.2d 986, 988 (Mass. 1982) ("The general rule is that an issue not raised in the trial court cannot be argued for the first time on appeal"); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 924 n.2 (Mass. 1983) (claim that commission had violated plaintiff's federal due process and equal protection rights by denying its license application were raised for the first time on appeal; Court denied to address those arguments); *Young v. Mobil Oil Corp.*, 345 N.E.2d 926, 927 (Mass. App. 1976) ("[T]he issue now argued was not raised in the pleadings in this case or otherwise presented to the trial judge and will not be considered for the first time on appeal"). Because petitioners failed to comply with the applicable procedure for raising their purported federal "due process" claims before the Massachusetts appellate courts, or to explain why the failure to comply with those requirements would not be an adequate and independent ground for the state court to disregard those claims, the Petition must be denied. *Cf. Adams*, 520 U.S. at 87-88.

Nor have Petitioners raised their federal claims with "fair precision and in due time." *Adams*, 520 U.S. at 88. This Court has consistently determined that an isolated citation to a federal case in the midst of an unrelated argument is insufficient to inform a state

court that a federal claim has been raised. *Id.* at 88; *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n. 9 (1987). *See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) ("generic reference" to Fourteenth Amendment insufficient to preserve a constitutional claim); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (vague appeal to constitutional principles does not preserve constitutional claim). Here, Petitioners made *no* citation to, or even mention of, any federal claim before the Superior Court, while their submission to the Appeals Court merely made a passing reference to "their due process" (App. 48a) and "equal treatment protected by the Fourteenth Amendment" — in the context of a challenge to a state medical malpractice tribunal statute that is *not* the subject of the instant Petition. (App. 51a.) *See Adams*, 520 U.S. at 89 n.3 ("passing invocations" of due process insufficient to raise constitutional issue). Finally, the application to the SJC for Further Appellate Review made *no* mention of any federal claim or "due process" whatsoever (App. 53a-71a.) Accordingly, the Petition must be denied.

II. Even If Petitioners Had Properly Raised With The State Courts The Claims They Seek To Present Here, The Petition Should Be Denied.

Reduced to its essence, the gravamen of Petitioners' complaint is that Justices of the Massachusetts Superior Court twice denied Motions for Reconsideration brought pursuant to Rule 60(b)(6) of the *Massachusetts* Rules of Civil Procedure.[8] (App.

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[8] *See* Petition at i (framing the question presented as "[d]oes it square with fundamental fairness to deny plaintiffs the right to a

(continued...)

1a-7a, 10a-17a.) Those denials were based *solely* upon state procedural law, as was the Appeals Court's unpublished, summary decision affirming the Superior Court. (*See* Petitioners' App. at 1a-6a.) In an effort to elevate the status of their claim as one which somehow implicates federal law, Petitioners observe that the Massachusetts rule is "substantially the same" as its federal counterpart. (Petition at 12.) This effort to array a state procedural law issue in federal clothing is unavailing, notwithstanding the Petition's ensuing analysis of a handful of decisions from certain federal courts of appeals interpreting *Federal* Rule 60(b). (Petition at 18.) Even Petitioners appear to acknowledge as much, when they admit that the federal courts' interpretation of Federal Rule 60(b) "is profoundly relevant to the scope of Rule 60(b) *in Massachusetts practice.*" (Petition at 12 (emphasis added).) The bottom line is that the case below presents merely a state procedural issue that is neither compelling nor one which mandates review by this Court.

Yet another reason for denying the Writ is that Petitioners' claim of an "emerging consensus" among lower federal courts (purportedly to the effect that dismissing claims for the gross neglect and egregious conduct of their attorneys "is a violation of due process" (Petition at 12)) is, upon closer examination,

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(..continued)

trial on the merits of their malpractice claims by refusing to characterize their attorney's inexcusable and gross neglect in prosecuting their claims as the kind of 'extraordinary circumstance' which justifies relief from a judgment of dismissal under Rule 60(b)?").

incorrect. Petitioners support their claim of an "emerging consensus" by citing to seven federal cases, dating back to 1969. (Petition at 18.) These cases, in addition to highlighting the inherently fact-specific nature of inquiries under Rule 60(b), are also notable in that, contrary to Petitioners' representation, *not a single one* of them even mentions "due process," let alone premises its analysis thereupon.[9] Perhaps the most charitable view of the legal landscape that Petitioners describe as being marked by an "emerging consensus" is the following analysis by commentators:

> [T]here is an older line of cases that holds that when an attorney is guilty of gross negligence, and the client is innocent of wrongdoing, relief from a judgment may be had under Rule 60(b)(6) even though this 'neglect' is not 'excusable' under Rule 60(b)(1). This line of cases goes against the general rule that conduct arguably within some other

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[9] Nor is it fair to suggest, as Petitioners do (Petition at 18), that five federal circuits have squarely determined that an attorney's gross negligence automatically entitles a claimant to relief pursuant to Rule 60(b)(6). For example, Petitioners apparently view the First Circuit as part of its "emerging consensus" by citing *Greenspun v. Bogan*, 492 F.2d 375 (1st Cir. 1974). Yet just last year, in *KPS & Associates, Inc. v. Designs by FMC, Inc.*, 318 F.3d 1 (1st Cir. 2003), the Court of Appeals noted — before rejecting a claim that an attorney's gross negligence qualified as "extraordinary circumstances" warranting relief pursuant to Rule 60(b)(6) because the claimant had failed to raise the issue with the District Court — that "in this circuit we have consistently turned a deaf ear to the plea that the sins of the attorney should not be visited upon the client." *Id.* at 17 (internal quotation omitted). *See also Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986) ("we have consistently indicated a reluctance" to "accept the proposition that when counsel's conduct shows gross negligence relief to a client may be afforded under Rule 60(b)(6)").

> subsection of Rule 60(b) should not be grounds for relief under the catch-all provision of Rule 60(b)(6). This line of cases is also illogical, in that the opponent is made to bear the brunt of unacceptable conduct by an attorney while the party that hired the attorney obtains relief. The Supreme Court has rejected this result and makes a client bear the consequences of misconduct by the attorney the client chose to hire.

12 MOORE'S FEDERAL PRACTICE, § 60.48[4][b] (3d ed. 2004) (internal cross-references omitted).

Perhaps aware of the potentially limitless factual scenarios that conceivably could implicate the catch-all provision of Rule 60(b)(6), this Court has discussed that provision on only a handful of occasions. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), the Court reaffirmed the principle that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396. The Court added that, "[c]onsequently, in determining whether respondents' failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable. *Id.* (emphasis in original).[10] *See also Link*

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[10] It warrants mentioning that this Court in *Pioneer Investment Services* specifically disagreed with the lower court's suggestion that "it would be inappropriate to penalize respondents for the omissions of their attorney." 507 U.S. at 396. The Court also disagreed with the lower court's approach in that it "appeared to focus its analysis on whether respondents did all they reasonably could in policing the conduct of their attorney, *rather than on whether their attorney, as respondents' agent, did all he reasonably could to comply with the court-ordered bar date.* In this, the court

(continued...)

v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962) ("[t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney has his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent").

Finally, even a cursory review of the extreme facts presented in *Klapprott v. United States*, 335 U.S. 601 (1949), confirms that Petitioners' reliance upon that case is unavailing. In *Klapprott*, the Court lifted a default judgment that had been entered against an individual four years earlier (which judgment had the effect of revoking his citizenship without a hearing). As this Court observed, Klapprott had not even had an opportunity to defend against the denaturalization action filed by the Government, as he had been imprisoned on other charges (later found to be unwarranted):

> [J]ail[ed] as he was, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges, he was no

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(..continued)

erred." *Id.* (emphasis added). Thus, even if, as Petitioners claim, they "never knew about, condoned, or approved" the conduct of their predecessor counsel (Petition at i), they still must be held accountable for the acts and omissions of their chosen counsel.

> more able to defend himself in the [denaturalization proceedings] than he would have been had he never received notice of the charges.

Id. at 614. In the instant case, in contrast, Petitioners were not unable to defend themselves against charges without the benefit of counsel. To the contrary, they were able to retain counsel of their choice to prosecute their civil claim. The consequences of that decision must be borne by Petitioners.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

MIIDDLESEX, ss SUPERIOR COURT DEPT.
C.A. MICV2000-05888

ORRIE TUCKER AND CATHERINE TUCKER,
Plaintiffs,
vs.

METROWEST MEDICAL CENTER, f/k/a FRAMINGHAM UNION HOSPITAL, and WILLLAM S. GEORGE, M.D.,
Defendants.

MOTION FOR RECONSIDERATION

Now come the Plaintiffs, Orrie and Catherine Tucker, in the above-captioned matter and hereby move this Honorable Court to reconsider pursuant to Mass.R.Civ.P. Rule 9D and Mass.R.Civ.P. Rule 60(b)(6) the allowance of the motion of Defendants' MetroWest Medical Center f/k/a Framingham Union Hospital and William S. George, MD to dismiss Plaintiffs Orrie Tucker and Catherine Tucker's Complaint for failure to post increased bond and to extend counsel's time for complying with the original Court order entered on October 30, 2001, which stated that Plaintiffs' counsel had ten business days to post a bond to continue with the case. Plaintiffs' counsel is herewith submitting a cash bond (a $6,000.00 check payable to the Commonwealth of Massachusetts).

In support of said motion for reconsideration, Plaintiffs rely upon the Affidavit attached hereto as Exhibit "I." and further state the following:

1. In December of 1996 Plaintiff Orrie Tucker was admitted at Defendant MetroWest Medical Center f/k/a Framingham Union Hospital and was under the care of Defendant William S. George, MD. Dr. George referred Plaintiff Orrie Tucker to a specialist, Bruce Marcel, MD, who recommended a sigmoidoscopy. Dr. George failed to order a sigmoidoscopy.

2. In November of 1997, Plaintiff Orrie Tucker was re-admitted at Defendant MetroWest Medical Center f/k/a Framingham Union Hospital and was transferred to Brigham & Women's Hospital where he underwent surgery for a bowel resection with a colostomy. The Defendant Dr. George was negligent and carelessly failed to provide the Plaintiff Orrie with the recommended sigmoidoscopy and proper diagnosis and treatment for the colon cancer. As stated in the expert witness letter of Charles S. Lipson, M.D., F.A.C.S., "It is routine medical practice to do a sigmoidoscopy and/or colonoscopy following an episode of G-I bleeding such as Mr. Tucker's. In this instance, there was a departure from the standard of care because it was not done as the consultant recommenced. The intussusception would not have occurred had the proper follow up of the G-I bleed been done because the polyp would not have been there to be a leading point. The colon resection and colostomy would not have been done and the associated discomfort and suffering would not have occurred." See Exhibit "A."

3. On or about December 15, 2000, the Complaint was filed with this Court.

4. On or about February 26, 2001, Defendant William S. George, MD filed with this Court his Answer as well as a Demand for a Medical Malpractice Tribunal.

5. On or about Friday, April 20, 2001, Defendant William S. George, MD.'s counsel refused to continue the medical malpractice tribunal even though the Defendant, MetroWest Medical Center had not filed an answer to the Complaint.

6. Thereafter, on or about the same day, Friday afternoon, April 20, 2001, Defendant, MetroWest Medical Center, filed an answer to the Plaintiffs' Complaint in hand to the Court.

7. Plaintiffs' counsel had previously advised both David Paparo, the malpractice clerk, and the Defendant, William S. George, M.D.'s counsel that the Plaintiffs' expert had not completed his opinion letter. Because the answer to the Complaint was due only five days before the medical malpractice tribunal was scheduled and the order for the medical malpractice tribunal was sent out on March 30, 2001, giving approximately three weeks to acquire and receive an expert opinion to submit with the offer of proof.

8. Having been denied the assent to the continuance, Plaintiffs' counsel and the Plaintiffs decided to waive the medical malpractice tribunal and pay the necessary bond and advised David Paparo, the medical malpractice clerk of this decision. See attached Exhibit "B".

9. On or about April 25, 2001, prior to the hearing scheduled for the same date, Plaintiffs' counsel gave a check in the amount of $6,000.00 as the surety bond. See attached Exhibit "C".

10. Plaintiffs' counsel then advised the clerk, Martha, in Courtroom 9A that the Plaintiffs wished to waive the tribunal and pay the bond. Plaintiffs' counsel asked if it was necessary to go before the Court and was advised by the clerk, Martha after she

checked with the Judge that no appearance would be necessary.

11. After receiving the Notice of Docket Entry dated April 26, 2001, Plaintiffs' counsel called Assistant Clerk, Jane M. Haviland, who advised her to contact the medical malpractice clerk, David Paparo, in order to correct the April 25, 2001 docket entry to reflect that the Plaintiffs had chosen to request a waiver and to pay the bond rather than to appear before the tribunal for the hearing.

12. A medical malpractice tribunal hearing was not held and therefore the docket entry is incorrect. The April 25, 2001 referenced docket entry is incorrect. See Exhibit "D".

13. Further, M.G.L. c. 231 § 60B, clearly states that,

> "...Each such action for malpractice shall be heard by said tribunal within fifteen days after the Defendant's answer has been filed. ..."

Clearly, Defendant, MetroWest Medical Center's Answer was filed only five days before the scheduled medical malpractice tribunal date and therefore, in fairness, the scheduled hearing date should have been continued upon the Plaintiffs' counsel's request on or about April 20, 2001.

14. According to Denton v. Beth Israel Hospital, 392 Mass. 277 (1984),

> "To require a Plaintiff who is willing to post the bond to go through the motions of presenting an offer of proof sufficient to meet such a lesser standard without any hope or intention of meeting the

> directed verdict standard, would result only in a waste of time."

Further, from Denton, in Footnote no. 4, the Court states,

> "Because we decide that a plaintiff may, in effect, "waive" the tribunal by declining to present an offer of proof, we will permit, and indeed we encourage, a plaintiff who wishes to do so to waive the tribunal proceeding by filing appropriate notice with the Court. This procedure will avoid the waste of resources entailed in assembling a tribunal that will have no function.... (See Exhibit "E")

The Plaintiffs' counsel advised the Court on April 20, 2001 that the Plaintiffs would pay the bond and waive the tribunal and also advised the legal member of the tribunal, Christopher J. Curtin, Esq., that the Plaintiffs intended to waive the tribunal.

15. Lastly, the Denton Footnote No. 3 indicates that Court disposed of the Denton case on the issue of waiver only and restrained from construing the section of G.L. c. 231 § 60B which addressed the reduction [sic *and conversely the expansion*] of the bond. (See Exhibit "E")

16. On or about October 30, 2001, the Court ordered "the Bond shall be increased to $12,000.00 payable * by Attorney Roberta Golden **. MetroWest Medical Center's Motion for Summary Judgment shall be heard on December 27, 2001, at 3 P.M., Briefs due to the Assistant Clerk of the Session's Office (Room 12-A) on or before December 20, 2001." [* *within ten business days.* ** *to be furnished by, Attorney Golden at her sole charge. Not to be posted to the client.*] (See Exhibit "F")

17. Defendants brought a *Motion to Dismiss the Complaint for Failure to Post the Increased Bond* on November 13, 2001 which was brought incorrectly since it was not presented in accordance with Superior Court Rule 9A, but rather mailed directly to the Court.

18. This Court ordered that an additional $6,000.00 be posted by Plaintiffs' counsel, within ten business days.

19. Plaintiffs' counsel upon receipt of the order immediately attempted to secure a Bond from Louis Hoffman Insurance, Boston, Massachusetts. The Bond Company did not respond.

20. Then, Plaintiffs' counsel contacted Amalgamated General Agencies, 115 Grove Street East, Westfield, New Jersey, which began the process of obtaining the required bond for the Court through Western Surety Company, of Sioux Falls, South Dakota. Plaintiffs' counsel expected the bond to be posted on Friday, November 16, 2001. (See Exhibit "G")

21. Defendants' *Motion to Dismiss,* dated November 13, 2001, was brought incorrectly and prematurely. Plaintiff's counsel was required to post a bond in the amount of $6,000.00, which would be due on November 16, 2001, calculating time to receive the Order in the mail and not counting Veteran's Day, November 11, 2001 since that was a holiday. Defendants' motion was brought incorrectly and three days prematurely.

22. On December 12, 2001, Amalgamated General Agencies responded stating that they were not in a position to provide the bond required. (See Exhibit "I")

23. Upon receipt of the denial, Plaintiff's counsel is submitting herewith a personal check payable to the Commonwealth of Massachusetts in the amount of $6,000.00 to satisfy the bond.

24. It would be grossly unjust and unfair to penalize the Plaintiffs who have a meritorious claim against the Defendants.

WHEREFORE, the Plaintiffs, Orrie and Catherine Tucker, requests that this Honorable Court reconsider pursuant to Mass.R.Civ.P. Rule 9D and Mass.R.Civ.P. Rule 60(b)(6) the allowance of the motion of Defendants MetroWest Medical Center f/k/a Framingham Union Hospital and William S. George, MD to dismiss Plaintiffs Orrie Tucker and Catherine Tucker's Complaint for failure to post increased bond and to extend counsel's time for complying with the original Court order entered on October 30, 2001, which stated that Plaintiffs' counsel had ten business days to post a bond to continue with the case and accept the cash Bond submitted with this Motion ($6,000.00 personal check from Attorney Roberta Golden payable to the Commonwealth of Massachusetts).

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CIVIL NO. 00-5888

ORRIE TUCKER, ET AL.,
Plaintiffs

v. MEMORANDUM and ORDER

METROWEST MEDICAL CENTER, ET AL.,
Defendants

MEMORANDUM

Defendant Metrowest Medical Center's Opposition to Plaintiff's Motion for Reconsideration accurately states the history of this matter.

I am firmly of opinion that the difficulties and delays this case has produced are due entirely to the unexcused--indeed, inexcusable--conduct of Plaintiff's counsel.

Experience teaches that a lawyer who so vigorously disregards requirements of the sort involved here generally does so to preserve a weak case.

That observation, however, is not controlling. A party is ordinarily entitled to a day in court, however obnoxious the lawyer's conduct. This right is nonetheless not unlimited. As between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant--put to unfair delay, expense, and uncertainty by plaintiff's counsel's shenanigans--the former should bear the consequences.

ORDER

Accordingly, it is Ordered, that Plaintiff's Motion for Reconsideration be, and the same hereby is, in all respects, Denied.

/s/
Hiller B. Zobel,
Associate Justice,
Superior Court

Dated: January 10, 2002

Entered on docket
& copies mailed 1/11/2002

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss SUPERIOR COURT DEPT.
C.A.MICV2000-05888

ORRIE TUCKER AND CATHERINE TUCKER,

Plaintiffs

vs.

METROWEST MEDICAL CENTER, f/k/a FRAMINGHAM UNION HOSPITAL and WILLIAM S. GEORGE, M.D.,

Defendants.

SECOND MOTION FOR RECONSIDERATION

Now come the Plaintiffs, Orrie and Catherine Tucker, in the above-captioned matter and hereby move this Honorable Court to reconsider pursuant to Mass.R.Civ.P. Rule 9D and Mass.R.Civ.P. Rule 60(b)(6) the allowance of the motion of Defendants' MetroWest Medical Center f/k/a Framingham Union Hospital and William S. George, MD to dismiss Plaintiffs Orrie Tucker and Catherine Tucker's Complaint for failure to post increased bond and to extend counsel's time for complying with the original Court order entered on October 30, 2001, which stated that Plaintiffs' counsel had ten business days to post a bond to continue with the case and the denial of the Plaintiffs' Motion for Reconsideration.

In support of said second motion for reconsideration, Plaintiffs rely upon the Affidavit attached hereto as Exhibit "I" and the motion for reconsideration dated December 12, 2001 and further state for the convenience of the court the following:

1. In December of 1996 Plaintiff Orrie Tucker was admitted at Defendant MetroWest Medical Center f/k/a Framingham Union Hospital and was under the care of Defendant William S. George, MD. Dr. George referred Plaintiff Orrie Tucker to a specialist, Bruce Marcel, MD, who recommended a sigmoidoscopy. Dr. George failed to order a sigmoidoscopy.

2. In November of 1997, Plaintiff Orrie Tucker was re-admitted at Defendant MetroWest Medical Center f/k/a Framingham Union Hospital and was transferred to Brigham & Women's Hospital where he underwent surgery for a bowel resection with a colostomy. The Defendant Dr. George was negligent and carelessly failed to provide the Plaintiff Orrie with the recommended sigmoidoscopy and proper diagnosis and treatment for the colon cancer. As stated in the expert witness letter of Charles S. Lipson, M.D., F.A.C.S., "It is routine medical practice to do a sigmoidoscopy and/or colonoscopy following an episode of G-I bleeding such as Mr. Tucker's. In this instance, there was a departure from the standard of care because it was not done as the consultant recommenced. The intussusception would not have occurred had the proper follow up of the G-I bleed been done because the polyp would not have been there to be a leading point. The colon resection and colostomy would not have been done and the associated discomfort and suffering would not have occurred." (See Exhibit "A.")

3. On or about December 15, 2000, the Complaint was filed with this Court.

4. On or about February 26, 2001, Defendant William S. George, MD filed with this Court his Answer as well as a Demand for a Medical Malpractice Tribunal.

5. On or about Friday, April 20, 2001, Defendant, William S. George, M.D.'s counsel refused to continue the medical malpractice tribunal even though the Defendant, MetroWest Medical Center had not filed an answer to the Complaint.

6. Thereafter, on or about the same day, Friday afternoon, April 20, 2001, Defendant, MetroWest Medical Center, filed an answer to the Plaintiffs' Complaint in hand to the Court.

7. Plaintiffs' counsel had previously advised both David Paparo, malpractice clerk, and the Defendant, William S. George, M.D.'s counsel that the Plaintiffs' expert had not completed his opinion letter. Because the answer to the Complaint was due only five days before the medical malpractice tribunal was scheduled and the order for the medical malpractice tribunal was sent out on March 30, 2001, giving approximately three weeks to acquire and receive an expert opinion to submit with the offer of proof.

8. Having been denied the assent to the continuance, Plaintiffs' counsel and the Plaintiffs decided to waive the medical malpractice tribunal and pay the necessary bond and advised David Paparo, the medical malpractice clerk of this decision. (See Exhibit "B")

9. On or about April 25, 2001, prior to the hearing scheduled for the same date, Plaintiffs' counsel gave a check in the amount of $6,000.00 as the surety bond. (See Exhibit "C")

10. Plaintiffs' counsel then advised the clerk, Martha, in Courtroom 9A that the Plaintiffs wished to waive the tribunal and pay the bond. Plaintiffs' counsel asked if it was necessary to go before the Court and was advised by the clerk, Martha after she checked with the Judge that no appearance would be necessary.

11. After receiving the Notice of Docket Entry dated April 26, 2001, Plaintiffs' counsel called Assistant Clerk, Jane M. Haviland, who advised her to contact the medical malpractice clerk, David Paparo, in order to correct the April 25, 2001 docket entry to reflect that the Plaintiffs had chosen to request a waiver and to pay the bond rather than to appear before the tribunal for the hearing.

12. A medical malpractice tribunal hearing was not held and therefore the docket entry is incorrect. The April 25, 2001 referenced docket entry is incorrect. (See Exhibit "D")

13. Further, M.G.L. c. 231 § 60B, clearly states that,

> "...Each such action for malpractice shall be heard by said tribunal within fifteen days after the Defendant's answer has been filed. ..."

Clearly, Defendant, MetroWest Medical Center's Answer was filed only five days before the scheduled medical malpractice tribunal date and therefore, in fairness, the scheduled hearing date should have been continued upon the Plaintiffs' counsel's request on or about April 20, 2001.

14. According to Denton v. Beth Israel Hospital, 392 Mass. 277 (1984),

> "To require a Plaintiff who is willing to post the bond to go through the motions of presenting an offer of proof sufficient to meet such a lesser standard without any hope or intention of meeting the directed verdict standard, would result only in a waste of time."

Further, from Denton, in Footnote no. 4, the Court states,

> "Because we decide that a plaintiff may, in effect, "waive" the tribunal by declining to present an offer of proof, we will permit, and indeed we encourage, a plaintiff who wishes to do so to waive the tribunal proceeding by filing appropriate notice with the Court. This procedure will avoid the waste of resources entailed in assembling a tribunal that will have no function.... (See Exhibit "E")

The Plaintiffs' counsel advised the Court on April 20, 2001 that the Plaintiffs would pay the bond and waive the tribunal and also advised the legal member of the tribunal, Christopher J. Curtin, Esq., that the Plaintiffs intended to waive the tribunal.

15. Lastly, the Denton Footnote No. 3 indicates that Court disposed of the Denton case on the issue of waiver only and restrained from construing the section of G.L. c. 231 § 60B which addressed the reduction [sic *and conversely the expansion*] of the bond. (See Exhibit "E")

16. On or about October 30, 2001, the Court ordered "the Bond shall be increased to $12,000.00 payable * by Attorney Roberta Golden **. MetroWest Medical Center's Motion for Summary Judgment shall be heard on December 27, 2001, at 3 P.M., Briefs due

to the Assistant Clerk of the Session's Office (Room 12-A) on or before December 20, 2001." [* *within ten business days.* ** *to be furnished by Attorney Golden at her sole charge. Not to be posted to the client.*] (See Exhibit "F")

17. Defendants brought a *Motion to Dismiss the Complaint for Failure to Post the Increased Bond* on November 13, 2001 which was brought incorrectly since it was not presented in accordance with Superior Court Rule 9A, but rather mailed directly to the Court.

18. This Court ordered that an additional $6,000.00 be posted by Plaintiffs' counsel within ten business days.

19. Plaintiff's counsel upon receipt of the order immediately attempted to secure a Bond from Louis Hoffman Insurance, Boston, Massachusetts. The Bond Company did not respond.

20. Then, Plaintiffs' counsel contacted Amalgamated General Agencies, 115 Grove Street East, Westfield, New Jersey, which began the process of obtaining the required bond for the Court through Western Surety Company, of Sioux Falls, South Dakota. Plaintiffs' counsel expected the bond to be posted on Friday, November, 16, 2001. (See Exhibit "G")

21. Defendants' *Motion to Dismiss,* dated November 13, 2001, brought incorrectly and prematurely. Plaintiff's counsel was required to post a bond in the amount of $6,000.00, which would be due on November 16, 2001, calculating time to receive the Order in the mail and not counting Veteran's Day, November 11, 2001 since that was a holiday. Defendants' motion was brought incorrectly and three days prematurely.

22. On December 12, 2001, Amalgamated General Agencies responded stating that they were not in a position to provide the bond required. (See Exhibit "I")

23. Upon receipt of the denial, Plaintiffs' counsel submitted a personal check payable to the Commonwealth of Massachusetts in the amount of $6,000.00 to satisfy the bond to the court on December 12, 2001.

24. On or about January 2, and January 4, 2002 each Defendant filed an Opposition to Plaintiffs' Motion for Reconsideration.

25. On January 10, 2002, Plaintiffs' counsel submitted an additional affidavit in response to Defendant, Metrowest Medical Center's opposition to Plaintiffs' Motion for Reconsideration. (See Exhibit "J")

26. On January 11, 2002 the court returned the Plaintiffs additional affidavit and refused to accept it for filing stating that the case was closed.

27. On or about January 10, 2002, the court denied the Plaintiffs' Motion for Reconsideration and notices were mailed on January 11, 2002.

28. Since the thrust of the court's decision is based upon the court's opinion that this case could not proceed because Plaintiffs' counsel's conduct Plaintiff is hereby submitting a notice of withdrawal of appearance and a notice of appearance for new counsel.

29. If the court allows this second Motion for Reconsideration, Plaintiffs' original counsel will resubmit her personal check in the amount of $6,000.00 as a cash surety bond, which was originally sent to the court on December 12, 2001 but then

returned to counsel with the denial of reconsideration.

30. It would be grossly unjust and unfair to penalize the Plaintiffs who have a meritorious claim against the Defendants.

WHEREFORE, the Plaintiffs, Orrie and Catherine Tucker, make this second request that this Honorable Court reconsider pursuant to Mass.R.Civ.P. Rule 9D and Mass.R.Civ.P. Rule 60(b)(6) the allowance of the motion of Defendants MetroWest Medical Center f/k/a Framingham Union Hospital and William S. George, MD to dismiss Plaintiffs Orrie Tucker and Catherine Tucker's Complaint for failure to post increased bond and to extend counsel's time for complying with the original Court order entered on October 30, 2001, which stated that Plaintiffs' counsel had ten business days to post a bond to continue with the case and the denial of the Plaintiffs' Motion for Reconsideration.

Respectfully submitted,
ORRIE TUCKER and CATHERINE TUCKER,
The Plaintiffs,
By their attorney,

/s/_____
Gerald J. Zyfers, BBO# 542967
80 Clinton Place
Newton, MA 02459-1141
(617) 641-9170

Dated: February 22, 2002

APPENDIX D

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

Civil Docket MICV2000-05888

RE: Tucker et al v Metrowest Medical Center, f/k/a Framingham Union Hospital et al

TO: Christopher R Lavoie, Esquire
Dunn & Associates
1 Union Street
Boston, MA 02108

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 04/23/2002:

RE: Plaintiff Orrie Tucker, Catherine Tucker's Second MOTION for reconsideration of Allowance of motion (P#14)Motion of Defts, Metrowest Medical Center, f/k/a/ Framingham Union Hospital and William S. George, M.D. to Dismiss Plffs, Orrie Tucker and Catherine Tucker's complaint for failure to post increased bond: Filed in Court.

is as follows:

Motion (P#27) DENIED. The instant motion, supported by attachments does not set forth reasons sufficient to disturb the Court's previous rulings. (Jeffrey Locke, Justice) Dated April 17, 2002. Notices mailed April 23, 2002

Dated at Cambridge, Massachusetts this 23rd day of April, 2002.

Edward J. Sullivan,
Clerk of the Courts

BY:

Mark J. Toomey/Jane M. Haviland
Assistant Clerk

Telephone: 617-494-4010 EXT 4341

Copies mailed 04/23/2002

APR 25 2002

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
No. 2001-P-1120

MIDDLESEX COUNTY DIVISION

ORRIE TUCKER AND CATHERINE TUCKER,
PLAINTIFFS-APPELLANTS,

v.

METROWEST MEDICAL CENTER, f/k/a
FRAMINGHAM UNION HOSPITAL, and
WILLIAM S. GEORGE, M.D.,
DEFENDANTS-APPELLEES

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT DEPARTMENT

Brief for the Plaintiffs-Appellants,
Orrie Tucker and Catherine Tucker

Gerald J. Zyfers
BBO#542967
Attorney At Law
80 Clinton Place
Newton, MA 02459
(617) 641-9170

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[1] STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion and erred as a matter of law in entering Final Judgment and dismissing the Plaintiff's Complaint for Failure to Post the Increased Bond and thereafter denying the Plaintiff's First and Second Motion for Reconsideration?

STATEMENT OF THE CASE

Plaintiff-Appellants, Orrie Tucker ("Orrie") and Catherine Tucker ("Catherine"), filed the original complaint in this action alleging that the Defendants, William S. George, M.D. ("George") and MetroWest Medical Center f/k/a Framingham Union Hospital ("Hospital") were negligent in that they failed to properly treat and diagnose the condition, colon cancer, of Plaintiff Orrie on or about December 27, 1996 until November 22, 1997 causing Plaintiff Orrie personal injuries and Plaintiff Catherine, Orrie's wife, loss of consortium and emotional distress. (A. 009-012).

[2] On February 26, 2001, Defendant George filed his Answer and Demand for Jury Trial. (A. 015-021). On February 26, 2001, Defendant George filed a Demand for Medical Malpractice Tribunal Pursuant to Chapter 231, § 60B. (A. 022). On March 30, 2001, an Order for Medical Malpractice Tribunal was issued by the Court setting the date for the tribunal to be held on April 25, 2001. (A. 024).

On or about April 20, 2001, Defendant Hospital filed its' Answer late, and a Demand for a Medical Malpractice Tribunal. (A. 026-033).

On April 25, 2001, the Plaintiffs Orrie and Catherine paid a cash bond in the amount of $6,000.00 into the Court prior to the scheduled hearing, choosing not to participate in a Medical Malpractice Tribunal. (A. 034). On April 26, 2001, a

Notice of Docket Entry was issued stating the following: Medical malpractice tribunal report: RE: William S. George, M.D.: The Tribunal upon its consideration determines that there is not sufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry. (Haggerty, J.). (A. 035).

On April 27, 2001, the Defendants, George and Hospital, brought a Motion to Increase the Bond Amount. (A. 037-055).

[3] On May 18, 2001, the Plaintiffs filed an Assented Motion to File Opposition Late and Plaintiffs' Opposition to Motion to Increase Bond Amount and Cross Motion to Vacate the Order of April 25, 2001 and to Allow the Plaintiffs' Motion to Waive the Medical Malpractice Tribunal. The Court never ruled on Plaintiffs' Motion to Waive the Medical Malpractice Tribunal but, in fact, since the $6,000.00 cash bond was paid prior to the Medical Malpractice Tribunal, the Plaintiffs did waive the Medical Malpractice Tribunal. (A. 004 and Addendum).

On May 21, 2001, a review status was sent by Hiller B. Zobel, Justice, for June 28, 2001. (A.057).

On June 15, 2001 Defendant George's Motion for Order for Inspection of Certain Hospital Records was allowed without objection. (A. 059-064).

On June 21, 2001 and June 27, 2001, both Defendants, Hospital and George, respectively served an Application Pursuant to Mass. R. Civ. P. 33(a). (A. 065-070). On July 20, 2001 and July 23, 2001, respectively the Plaintiffs served Answers to Interrogatories on the Defendants, Hospital and George.

On June 28, 2001, the Defendants' Motion to Increase the Bond Amount was allowed in the amount of **[4]** $12,000.00, and the Court stayed the allowance of the Motion pending a hearing scheduled for 8/10/01. The hearing scheduled for August 10, 2001, was canceled by the Court.

Because the Court canceled the August 10, 2001 hearing date, on August 14, 2001, the Plaintiff mailed a copy of the Plaintiffs' Expert Letter of Dr. Charles S. Lipson to the Court and to opposing counsel, pursuant to the June 25, 2001 Order of the Court which had stayed the additional bond pending the production of the expert letter. (A. 126-127).

In spite of the filing of the expert letter on August 14, 2001, on October 25, 2001, the Court ordered without a hearing the following which was entered on the docket on October 30, 2001, stating that "The bond shall be increased to $12,000 payable by Attorney Golden within ten business days. To be furnished by Attorney Golden at her SOLE charge. Not to be passed on to the client. MetroWest Medical Center's motion for Summary Judgment shall be heard on December 27, 2001 at 3pm, briefs due to the Assistant Clerk of the Session's Office (Room 12-A) on or before December 20, 2001." (Hiller B. Zobel, Justice) Dated October 25, 2001. (A. 005 and A. 152).

[5] No summary judgment motion had been served upon Plaintiffs' counsel nor was pending before the Court.

On November 13, 2001, both Defendants filed a Motion to Dismiss the Plaintiffs' Complaint for Failure to Post an Increased Bond and A Motion for Entry of Final Judgment. (A. 141-148).

On November 11, 2001, the Court made findings under Rule 54(b) in favor of the Defendants. The Order did not reflect the submission of the expert letter. Further, the order stated that "it is in the interest of both Plaintiff and Defendant - and in the interest of sound judicial administration - to have the matter conclusively determined at this time." (A. 196).

On November 11, 2001, the Court allowed the Defendants' Motion to Dismiss Plaintiffs' Complaint for Failure to Post Increased Bond. (A. 198).

On November 20, 2001, the Plaintiffs filed an Opposition to Defendants Motions to Dismiss the Complaint for Failure to Post the Increased Bond and

for Entry of Final Judgment because the Court did not mail out the Court's decisions of November 11, 2001, until November 27, 2001 (A. 005).

[6] On December 13, 2001, the Plaintiffs filed a Motion for Reconsideration of the Court's allowance of the Defendants Motion to Dismiss and for Entry of Final Judgment and the personal check of Counsel in the amount of $6,000.00, as well as the Affidavit of Counsel with Exhibits A-I attached. (A. 161-191).

On January 2, 2002, Defendant George filed an Opposition to Plaintiffs' Motion for Reconsideration. (A. 192-195).

On January 4, 2002, Defendant Hospital filed an Opposition to Plaintiffs' Motion for Reconsideration. (A. 199-203).

On January 10, 2002, Plaintiffs' Counsel filed an Affidavit in Response to Defendant MetroWest Medical Center's Opposition to Motion for Reconsideration. (A. 204-206).

On January 11, 2002, the Court, Zobel J., denied Plaintiffs' Motion for Reconsideration (A. 207) and entered judgment as follows: This action came on to be heard before the Court (Zobel J.) presiding, upon motion of the defendant to dismiss and the court having allowed said motion on November 21, 2001, (rather than November 11, 2001 as entered on the docket sheet) the plaintiff having filed a request for reconsideration of the November 21, 2001 ruling **[7]** and the court having denied that request the complaint is ordered dismissed with prejudice. The $6,000.00 check [sic. Personal check of Plaintiffs' counsel as ordered] attached to the motion for reconsideration is to be returned to the plaintiff (Zobel J.). (A. 210).

The Plaintiffs appealed the denial of the Defendants' Motion of Reconsideration on February 5, 2002. (A. 006).

On March 20, 2002, the Plaintiffs filed a Second Motion for Reconsideration of the Allowance of the

Defendants' Motion to Dismiss the Complaint for Failure to Post the Increased Bond. (A. 006).

On April 23, 2002, the Court denied the Plaintiffs' Second Motion for Reconsideration. (A. 007).

On May 22, 2002, the Plaintiffs filed an Appeal of the Denial of the Second Motion for Reconsideration which appeal was consolidated with the earlier appeal. (A. 007).

STATEMENT OF RELEVANT FACTS

The Tucker's Complaint alleges that the Defendant, William S. George, M.D., a duly licensed **[8]** physician, specializing in internal medicine, and surgery, and an employee of MetroWest Medical Center and MetroWest Medical Center f/k/a Framingham Union Hospital, failed to properly treat and diagnose the condition of the Plaintiff Orrie resulting in the Plaintiff Orrie being subjected to emergency abdominal surgery for adenocarcinoma of the colon by intussusception of the colon and removal of an eight (8) inch section of the colon requiring a colostomy. Orrie had presented to Dr. George for treatment of a bloody rectal discharge precipitated from an episode of diarrhea from Dr. George on December 31, 1996. (A. 009-012). Pursuant to the expert's testimonial letter,

> "He (Orrie) gradually improved with supportive measures and the primary focus of the physicians was Mr. Tucker's vascular problems secondary to his Diabetes Mellitus. A Dr. Marcel gave a G-I consultation and recommended a sigmoidoscopy after the patient was discharged.
>
> Doctor George did not follow-up and order a sigmoidoscopy. The sigmoidoscopy was never done.
>
> In November 1997 he was readmitted to Metrowest Medical Center with a

staphyloccal endocarditis. This resulted in a transfer to the Brigham and Women's Hospital where a mitral valvuloplasty was done. A few days later he developed a bowel obstruction. Dr. Jacobs did a bowel resection with a temporary colostomy. The **[9]** colostomy was maintained a couple of months. The post-operative diagnosis was intussusception induced by a large polyp as the leading point with a carcinoma-in-situ in it. He did well postoperatively and the colostomy was closed in a couple of months.

It is routine medical practice to do a sigmoidoscopy and/or colonoscopy following an episode of G-I bleeding such as Mr. Tucker's. In this instance, there was a departure from the standard of care because it was not done as the consultant recommended.

The intussusception would not have occurred had the proper follow up of the G-I bleed been done because the polyp would not have been there to be a leading point. The colon resection and colostomy would not have been done and the associated discomfort and suffering would not have occurred. (A. 127).

On December 27, 1996, Orrie had rectal bleeding, cramps, diarrhea and vomiting. Orrie was taken to Columbia MetroWest Medical Center f/k/a Framingham Union Hospital by his wife, Catherine, in the late afternoon to the emergency room. He was seen and examined by Dr. Brown and others. Dr. Brown said he felt a large rectal polyp. He had an IV inserted in his right forearm. Orrie continued to pass blood rectally. A podiatry resident examined his left

foot where there was discharge at the little toe. (He is an insulin dependent diabetic). Following contact by the ER with the Primary Care Physician, Dr. George, **[10]** Orrie was admitted to the hospital. According to the hospital record, he was examined by a resident and a house officer, both of who questioned ruling out colon cancer. A consult was requested of Dr. Bruce Marcel (GI). Again, per hospital record, on December 28, 1996, the nurses' noted Orrie was still passing small amounts of bright red blood. The record shows that on December 29, 1996, Dr. Marcell's consult note was that stool culture in progress, no mass, no polyps, and even if stool culture is negative then do sigmoidoscopy. No stool culture was ever done nor the sigmoidoscopy. The site of the IV showed infection on January 3, 1997, with blister, skin tear, drainage that did not cease until April and Orrie was left with a two inch scar on his right forearm. Also, on January 3, 1997, Dr. Adams (podiatrist) operated for osteomylelitis of the left little toe area. Orrie was treated by Columbia Home Care from January 7, 1997 to May 1997, and by Dr. Adams until October 1997. He was admitted to Brigham & Women's Hospital in December of 1997. On December 22, 1997, when Orrie was operated on the cancer was **[11]** discovered resulting in a colostomy and removal of an eight inch section of his colon. (A. 075-076)

The Tuckers' Complaint was filed on December 20, 2000 and service on the Hospital was returned to the Court on February 15, 2001. Dr. George's Answer and Request for Medical Malpractice Tribunal were filed on February 27, 2001. On March 30, 2001, the Court scheduled the Medical Malpractice Tribunal for April 25, 2001. (A. 003).

Upon receipt of the Tribunal Notice, Plaintiffs' counsel advised both David Paparo, the malpractice clerk, and the Defendant, George's counsel that the Plaintiffs' expert had not completed his opinion letter. Moreover, as of the morning of April 20, 2001, the Defendant Hospital had not filed an answer to the

Complaint and in fact were in default by approximately 39 days or since March 12, 2001 since the Hospital had been served the Complaint on February 15, 2001. (A. 003 and Addendum).

On April 20, 2001, Plaintiffs' counsel requested an assent to a continuance of the Tribunal from Dr. George's counsel particularly since the Hospital failed to answer and was in default. During the **[12]** afternoon of April 20, 2001, the Defendant Hospital filed its' Answer and a Request for a Medical Malpractice Tribunal. (A. 003).

Even though, on April 20, 2001, the malpractice clerk agreed to postpone the Medical Malpractice Tribunal which was scheduled for April 25, 2001, Defendant George's counsel refused to assent to the continuance. (Addendum Exhibit B).

Having been denied the assent to the continuance by Dr. George's counsel, Plaintiffs' counsel and the Plaintiffs decided to waive the Medical Malpractice Tribunal and to pay the necessary bond. Plaintiff's counsel advised Paparo, the medical malpractice clerk of this decision. (Addendum 2).

On April 25, 2002, prior to the Medical Malpractice Tribunal hearing, Plaintiffs gave a certified bank check in the amount of $6,000.00 as a surety bond. (A. 176).

Plaintiffs' counsel then advised the clerk, Martha, in Courtroom 9A that the Plaintiffs wished to waive the tribunal and pay the bond. Plaintiffs' counsel asked if it was necessary to go before the Court and was advised by the clerk, Martha after she **[13]** checked with the Judge Haggerty that no appearance would be necessary. (Addendum 2).

After receiving the Notice of Docket Entry dated April 26, 2001, Plaintiffs' counsel called Assistant Clerk, Jane M. Haviland, who advised her to contact the medical-malpractice clerk, David Paparo, in order to correct the April 25, 2001 docket entry to reflect that the Plaintiffs had chosen to request a waiver and

to pay the bond rather than to appear before the tribunal for the hearing. (Addendum 2).

A medical malpractice tribunal hearing was not held. It appears that the April 25, 2001 referenced docket entry is incorrect. (Addendum Exhibit C).

On June 28, 2001, Judge Zobel held a hearing regarding the Plaintiffs' Motion to Increase the Bond Amount the allowance of which was stayed pending the Court's receipt of an expert opinion. Judge Zobel's session was canceled on August 10, 2001, which date had been set to review the allowance of the additional bond. Since the hearing was not held, Plaintiffs' counsel sent Dr. Lipson's expert opinion directly to the Court on August 14, 2001 with copies sent to opposing counsel. (A. 126-127).

[14] In spite of the appropriate submission of the expert's opinion, which should not have been required since the Plaintiffs choose to waive the Medical Malpractice Tribunal, Judge Zobel ordered that the an additional $6,000.00 be paid by Plaintiffs' counsel only, within ten (10) business days. (A. 154) The order of October 30, 2001 reads as follows:

> "the Bond shall be increased to $12,000.00 payable * by Attorney Roberta Golden ** MetroWest Medical Center's Motion for Summary Judgment shall be heard on December 27,2001, at 3 P.M., Briefs due to the Assistant Clerk of the Session's Office (Room 12-A) on or before December 20, 2001." [* *within ten business days.* ** to *be furnished by Attorney Golden at her* sole *charge. Not to be passed to the client.*] (A. 190)

Defendants brought a *Motion to Dismiss the Complaint for Failure to Post the Increased Bond* on November 13, 2001 which was brought incorrectly since it was not presented in accordance with

Superior Court Rule 9A, but rather mailed directly to the Court. (A. 190)

Upon receipt of the order, Plaintiffs' counsel immediately attempted to secure a Bond from Louis Hoffman Insurance, Boston, Massachusetts. The Bond Company did not respond timely. (A. 191).

[15] Plaintiffs' counsel then contacted Amalgamated General Agencies, 115 Grove Street East, Westfield, New Jersey, which began the process of obtaining the required bond for the Court through Western Surety Company, of Sioux Falls, South Dakota. Plaintiffs' counsel expected the bond to be posted on Friday, November 16, 2001. (A. 191).

Defendants' *Motion to Dismiss,* dated November 13, 2001, had been brought incorrectly and prematurely. Plaintiffs' counsel was required to post a bond in the amount of $6,000.00, which would have been due on November 16, 2001, calculating time to receive the Order in the mail and not counting Veteran's Day, November 11, 2001 since it was a holiday and the banks were closed. Defendants' motion was brought incorrectly and three days prematurely. (A. 191).

On or about November 29, 2001, Plaintiffs' counsel received Notice from the Court, in which her conduct was unfairly characterized:

> "Motion (P#14) Motion of Defts, Metrowest Medical Center, f/k/a Framingham Union Hospital and William S. George, M.D. to Dismiss Plffs, Orrie Tucker an Catherine Tucker's complaint for failure to post **[16]** increased bond: The memorandum titled, respectively, Plff's Opposition to Defts' Motion to dismiss the Complaint for Failure to Post the Increased Bond and Plffs' Opposition to Defts' Motion for entry of Final Judgment) are unpersuasive. Plffs' counsel's conduct can best be characterized as Fabian; it does not

merit further indulgence. (Hiller B. Zobel, Justice)" (A. 191).

On December 12, 2001, Amalgamated General Agencies responded stating that they were not in a position to provide the bond required. (A. 191).

On December 12, 2001, Plaintiffs' counsel forwarded her personal check payable to the Commonwealth of Massachusetts in the amount of $6,000.00 to satisfy the additional bond. On January 11, 2002, the Court returned the check, which had been sent to the Court with a Motion for Reconsideration, to Plaintiffs' counsel. The Court denied the Motion for Reconsideration and entered judgment for the Defendants on January 11, 2002. (A. 210).

Since the thrust of the Court's decision was based upon the Court's opinion that the Plaintiffs could not proceed because of Plaintiffs' counsel's alleged conduct, Plaintiffs' original counsel **[17]** withdrew from the case and a Second Motion for Reconsideration citing the removal of counsel was filed with a continued guarantee that Plaintiffs' original counsel would resubmit her personal check in the amount of $6,000.00 as a cash surety bond. The original $6,000.00 bond was paid on April 25, 2001. The additional $6,000.00 bond was paid, but not accepted by the Court, on December 12, 2001. The Second Motion for Reconsideration was based upon the withdrawal of counsel and the unfairness of penalizing the Plaintiffs who had an extremely meritorious claim against the Defendants. (A. 223). This Appeal is brought of the allowance of the Plaintiffs' Motion to Dismiss the Complaint for Failure to Post the Increased Bond consolidated with Appeals regarding the denials of the First and Second Motion of Reconsideration.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN ENTERING FINAL JUDGMENT AND DISMISSING THE PLAINTIFFS COMPLAINT FOR FAILURE TO [18] POST THE INCREASED BOND AND DENYING PLAINTIFFS FIRST AND SECOND MOTIONS FOR RECONSIDERATION.

The Trial Court abused its discretion and erred as a matter of law because Massachusetts General Laws Chapter 231, Section 60B has been interpreted to mean that the "Plaintiff in a medical malpractice action is entitled to decline to present an offer of proof to a Medical Malpractice Tribunal pursuant to G.L. c. 231, Section 60B, without incurring dismissal of the action" Mornell Denton et al v. Beth Israel Hospital, 392 Mass. 277 (1984).

A. The Plaintiffs Chose to Waive the Medical Malpractice Tribunal Requirement and Paid the Surety Bond Timely

On the morning of April 25, 2001, the Plaintiffs, having decided to waive the Medical Malpractice Tribunal, paid the required $6,000.00 cash bond. The malpractice clerk had been advised of same and Plaintiffs' counsel had been advised that an appearance in Court to secure the waiver would not be required. Plaintiffs' Post Motion to Waive the Tribunal was never acted upon by the Court, so the **[19]** record was never corrected as it should have been (Addendum 1-3).

In Denton v. Beth Israel Hospital, *supra*, the Court held that "Because the statute states that "the plaintiff shall present an offer of proof," (emphasis added) but does not specify the consequences of failure to do so, the defendant suggests a rule that a plaintiff must present a "minimally adequate" offer of

proof to avoid dismissal. Even aside from the difficulty of articulating and applying an appropriate standard, however, we see no purpose which would be served by the proposed rule. Any standard would have to be much less exacting that the directed verdict standard which a plaintiff must meet in order to prevail at a tribunal.... To require a Plaintiff who is willing to post the bond to go through the Motions of presenting an offer of proof sufficient to meet such a lesser standard, without any hope or intention of meeting the directed verdict standard, would result only in a waste of time.... Footnote 4. Because we decide that a Plaintiff may, in effect, 'waive' the tribunal by declining to present an offer of proof, and indeed we encourage a **[20]** plaintiff who wishes to do so to waive the tribunal proceeding by filing appropriate notice with the Court."

As described in the relevant statement of facts and in the pleadings, the Plaintiffs' counsel had notified the Court regarding the requested waiver. The Plaintiffs therefore should not have been required to present an offer of proof.

In addition, the Denton court found that any changes in bond amounts should be heard by the tribunal judge. In the present case, Judge Haggerty presided over the tribunal on April 25, 2001, and Judge Zobel later ordered the bond increased. Judge Haggerty should have heard any motions relating to the bond.

The Denton court stated that "in the case of an indigent plaintiff, the Judge should not reduce the bond below $2,000.00 unless the Plaintiff has made a good faith effort to present an offer of proof sufficient to meet the direct verdict standard. Footnote 5.... For this reason any reduction of bond must, in accordance with the terms of the statute, be made by the judge who presides at the tribunal."

[21] Of course, the converse situation of increasing rather than reducing the bond amount would be addressed the same as described above.

Conversely to Denton *supra*, the Plaintiffs herein made a good faith effort to present an offer of proof to the Court, the expert letter of Dr. Charles Lipson stating that "there was a departure from the standard of care ... because Dr. George did not follow up and order a sigmoidoscopy." (A. 127).

The offer of proof however, was not required and should have become an issue.

A determination as to the sufficiency of an offer of proof however, cannot be made by the tribunal judge alone. The decision must be that of the three member panel. It was held in Paro v. Longwood Hospital, 373 Mass. 645 (1977) regarding whether or not the Plaintiff presented a legally sufficient claim that, "the tribunal decision is a collective one, with all three members participating equally." It appears in the present case that Judge Zobel has made his singular determination that the Plaintiff did not present a sufficient offer of proof, even though an offer of proof was not required **[22]** because the $6,000.00 bond was paid. On November 11, 2001, Judge Zobel wrote in his findings under Rule 54(b) that "it is in the interest of both plaintiff and defendant - and in the interest of sound judicial administration - to have the matter conclusively determined at this time" without further conclusions. (A. 196).

The Plaintiffs submit that the factual and documented record describes a situation which support the Plaintiffs claim that an appropriate bond was timely posted; that a finding solely by the Judge that the Plaintiffs claim was frivolous, without the benefit of a three member tribunal, was an abusive discretion; that the requirement of an additional bond was unwarranted and prejudicial and not based on the evidence presented to the tribunal and lastly that the choice of not submitting to the tribunal does not give rise to a dismissal in the present case.

B. The Plaintiffs Underlying Claims are Meritorious and Not Frivolous and Would Pass a Medical Malpractice Tribunal

[23] A claim is considered meritorious in the narrow sense that it is "worthy of presentation to a court, not one which is sure of success" Joans v. Manns, 33 Mass. App. 485, 493, n.9 (1992). The underlying claims in the present case are meritorious and would not have failed the directed verdict burden before a medical malpractice tribunal.

The Court outlined the requirements for the evaluation of the offer of proof in Kapp v. Ballantine, 380 Mass. 186, 193 (1980). The Kapp case states that "to succeed against a physician, the plaintiff's offer of proof must show that:

(1) A doctor-patient relationship existed;

(2) The doctor did not conform to accepted medical standards in performing his duties with regard to the patient; and

(3) Damage resulted from this failure to conform.

Further, in Perez v. Bay State Ambulance and Hospital, Inc. et al., 413 Mass. 670 (1992) citing Gugino v. Harvard Community Health Plan, 380 Mass. 464, 468 (1980), the Court found that in "evaluating the offer of proof, the tribunal may not examine the weight and credibility of the evidence." The **[24]** Plaintiffs case clearly conforms to the requirement described above.

It is uncontroverted that the Plaintiff, Orrie, and Dr. George had a doctor-patient relationship.

Dr. Charles S. Lipson's expert letter submitted to the Court clearly states that the Dr. George did not conform to accepted medical standards in that Dr. George failed to provide the Plaintiff with the recommended sigmoidoscopy and proper diagnosis

and treatment for colon cancer. As stated in the expert witness letter of Charles S. Lipson, M.D., F.A.C.S., "It is routine medical practice to do a sigmoidoscopy and/or colonoscopy following an episode of G-I bleeding such as Mr. Tucker's. In this instance there was a departure from the standard of care because it was not done as the consultant recommended. The intussusception would not have occurred had the proper follow-up of the G-I bleed been done because the polyp would not have been there to be a leading point. The colon resection and colostomy would not have been done and the associated discomfort and suffering would not have occurred." (A. 127).

[25] And lastly, it is uncontroverted that the Plaintiff suffered from the colon resection and the necessity of a colostomy.

A nearly identical case was recently reported in the Massachusetts Lawyers Weekly dated March 4, 2002 wherein the Plaintiffs claimed that the Defendant Doctors failed to comply with the applicable standards of care in the treatment of the Plaintiff by failing to diagnose his cancer in a timely manner for a Plaintiff who had presented to the Defendant Doctor with a history of frequent diarrhea and showing blood. The Defendant Doctor did not schedule, recommend or mention a colonoscopy. When the Plaintiff sought medical treatment from a different medical provider it was discovered through a colonoscopy that he had a large ulcerated mass. The Plaintiff underwent chemotherapy and radiation therapy, and after five years the patient had not suffered any reoccurrence of the cancer and was considered to have made a full recovery. The case settled prior to trial for $300,000.00 (Addendum 4).

In light of the above, the Plaintiff Orrie certainly is due compensation.

[26] Additional evidence would have been available to a tribunal in the present case, including all medical records of the Plaintiff as well as the sworn and

extensive Answers to Interrogatories by both Plaintiffs which could have been provided to the Court. (A. 074-111).

In determining if the evidence presented ".... is sufficient to raise a legitimate question of liability appropriate for judicial inquiry" the statute, M.G.L.231 § 60B, "even empowers the tribunal to 'summon a subpoena any such records or individuals to substantiate or clarify any evidence which has been presented before it... {or} to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto.' Little v. Rosenthal, 376 Mass. 573, (1978).

Even of the Plaintiff had chosen to be subjected to the tribunal his case would have passed muster. Because of the idiosyncrasies described in the statement of facts, the Plaintiff's case was never subjected to the tribunal scrutiny.

[27] Had the Defendant George's counsel assent to the continuance of the tribunal hearing when requested by Plaintiffs' counsel, due to the fact that the Defendant Hospital had defaulted by not answering the Complaint until 67 days after the Complaint was served and only five days before the scheduled tribunal, the Plaintiffs' case would have been submitted to the tribunal.

In McMahon v. Glixman, 379 Mass. 60, (1979), the "plaintiffs were entitled to a review of their claim of errors by the tribunal, even though they had not filed a bond as ordered by the tribunal as a condition precedent to pursuing the usual judicial process."

Further, "on the directed verdict standard of reviewing the plaintiff's evidence, i.e., in a light most favorable to the plaintiff, Graci v. Massachusetts Gas & Elec. Light Supply Co., Mass. App. Ct. 221, 222 (1979), the offer of proof was sufficient." Dinozzi v. Lovejoy, 20 Mass. App. Ct. 973 (1985). In the present case, the Plaintiffs' evidence when viewed in a light

most favorable to the **[28]** plaintiff would undoubtedly have survived a directed verdict.

Even in Delicata v. Bourlesses, 9 Mass. App. Ct. 713 (1980) where the offer of proof of a husband seeking damages from the Defendant, a nurse, for negligence leading to the death of his wife by drowning while unattended in a tub was sufficient to raise a legitimate question of liability before the medical malpractice tribunal convened under G.L. c. 231, Section 60B, where, among documents presented indicating that the patient suffered from cancer and had suicidal tendencies, a qualified registered nurse with experience in psychiatric and mental health nursing stated in a sworn affidavit that she had the opinion that the patient, to whom the defendant was assigned, "was suicidal, severely depressed and exhibited a worsening clinical condition... {which} required visual observations... once every fifteen (15) minutes, "that the defendant had the responsibility" to ensure that such observations were made, that her failure to observe the patient for the 45 minute period during which the drowning occurred amounted to a "deviation from good and acceptable" **[29]** nursing and psychiatric and mental health practice, and that the defendant's conduct was a "contributing cause of the death."

Although the Plaintiff complied with the requirements of the statute and would have survived the scrutiny of a medical malpractice tribunal, the Judge ignored the Standing Order requiring the submission of motions pursuant to Rule 9A and prematurely issued his decision against the Plaintiffs even being in receipt of Dr. Lipson's testimonial letter.

C. The Dismissal of the Complaint was Unconstitutional and Unjustly Penalized the Plaintiffs.

The Judge abused his discretion and erred as a matter of law when he penalized the Plaintiffs because

of the alleged misconduct of the Plaintiffs' original counsel. The Judge based his dismissal upon the failure to post the increased bond in the amount of $6,000.00 by the Plaintiffs' counsel only and at her sole expense within ten business days. The memorandum of the decision reads as follows:

> **[30]** "I am firmly of opinion that the difficulties and delays this case has produced are due entirely to the unexcused--indeed, inexcusable-conduct of Plaintiff's counsel.
>
> Experience teaches that a lawyer who so vigorously disregards requirements of the sort involved here generally does so to preserve a weak case.
>
> That observation, however, is not controlling. A party is ordinarily entitled to a day in court, however obnoxious the lawyer's conduct. This right is nonetheless not unlimited. As between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant -put to unfair delay, expense, and uncertainty by plaintiff's counsel's shenanigans-the former should bear the consequences." (A. 208).

First, the Plaintiffs' counsel did not cause delays of the case. A careful reading of the relevant statement of facts shows that the case was not delayed, but in fact was well on track when the case was abruptly dismissed. In fact, discovery in the case per the tracking order was not to be completed until February 8, 2003. The Plaintiffs had responded to all of the discovery served upon them by the Defendants by July 23, 2002. (A. 014).

The Plaintiffs' counsel actually paid the additional $6,000.00 bond on December 12, 2001 which was due on November 16, 2001 but which was delayed

[31] because of the Plaintiffs' counsel's excusable delay in acquiring a surety bond or the funds necessary to post the bond. No specific reasons, except the Judge's sole decision that the Plaintiffs' counsel had "a weak case" and that the Defendants were "innocent", were given by the Judge.

Even if the Plaintiffs' counsel's conduct was neglectful, the neglect was excusable when the Plaintiffs' counsel cured the noncompliance by paying the $6,000.00 bond on December 12, 2001. In Springfield Young Women's Christian Association v. Evers, 30 Mass. App. Ct. 921, the Court held that a dismissal of an appeal was not allowed when the Appellant had cured his noncompliance.

> "The Judge could properly find, as he did, that the defendant's counsel had been neglectful in not moving sooner, after learning of the loss of the transcripts, to put together a proposed statement of the evidence. The Judge, however, made the mistake of considering the motion to dismiss on the state of facts that had existing on November 16, 1988, when the motion was originally heard, rather than on the facts as they were on December 28, after the statement of the evidence and a motion for settlement had been filed. The allowance of the motion for reconsideration vitiated the original order of dismissal and the proceedings on November 16. The motion stood on December 28 as if it had **[32]** not previously been heard. The prerequisite to dismissal under Rule 10 (c) no longer existed: the noncompliance had been cured."

In Harnish v. Children's Hospital Medical Center, 387 Mass.152, (1982), the action was dismissed after the Plaintiff failed to post a bond in accordance with G. L. c. 231, Section 60B. The Plaintiff appealed from the judgment of dismissal successfully, claiming that her offer of proof satisfied the requirements of the directed verdict test. The Plaintiff's satisfactory offer of proof had consisted of her affidavit, and opinion letter from two oral surgeons and various hospital reports. Such is the case at hand. The tribunal (and here the Judge alone) would have been able to review the sworn testimonial answers to interrogatories of both Plaintiffs, the opinion letter of Dr. Charles S. Lipson, and all the hospital records which the Court had ordered without Plaintiffs' objection to be secured by the Defendants on June 15, 2001.

In Kapp v. Ballantine, 380 Mass. 186 (1980), the Plaintiffs action was dismissed in the Superior Court **[33]** for failure to file the bond ordered by a medical malpractice tribunal. The Appeals Court

> "ordered vacated the Superior Court judgment dismissing the action because of the plaintiff's failure to file bonds following a finding for the defendants and an order by the medical malpractice tribunal under the pursuit of claims provision in G. L. c. 231, Section 60B, and ordered vacated the tribunals order, and ordered substitution of a finding and decision that upon the offers of proof presented by the plaintiff the evidence, of properly substantiated, is sufficient to raise a legitimate question of liability appropriate for judicial inquiry."

The case cites the statute further

> "If a finding is made for the defendant the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of two thousand dollars secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant for costs assessed including witness and experts fees and attorney fees if the plaintiff does not prevail in the final judgment. Said single justice may, within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed."

A tribunal was not held in the present case. The increased bond at issue was ordered to be increased within ten business days, rather than the thirty days required by the statute if a tribunal had been held. **[34]** The Judge's Order of ten days constituted a potential error of law. Assuming that the Judge actually made a tribunal type decision as to the sufficiency of the evidence when he made the finding in his memorandum of January 10, 2002 which judgment related back to the November 21, 2001 ruling against the Plaintiffs, stating that "as between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant... the former should bear the consequences", the Judge abused his discretion.

Assuming arguendo, that the statute had been followed, the increased bond would have been due on or about November 30, 2001. The Plaintiffs' counsel paid the increased amount on December 12, 2001 under a Motion for Reconsideration because the Court

had already acted and dismissed the Plaintiffs' Complaint for failure to post the increased bond on November 27, 2001. (A. 005).

Moreover, the Court had been in possession of Dr. Lipson's expert letter since August 14, 2001 but apparently had never reviewed same after canceling the scheduled hearing on August 10, 2001. Had the Court reviewed the expert submission, the Court could **[35]** have recommended that the case be returned for a medical malpractice tribunal review. Nevertheless, neither the tribunal nor the Judge had the right to weigh the credibility of the evidence. In Halley v. Birbiglia, 390 Mass. 540 (1983) it was held that

> "our standard of review in this action is akin to that used in evaluating a defendants motion for a directed verdict; the plaintiffs must present evidence sufficient to raise a question suitable for judicial inquiry, however, any 'appraisal of the weight and credibility of {such} evidence is impermissible.'" Gugino v. Harvard Community Health Plan, 380 Mass. 464, 468 (1980).

Another example of the Court allowing the Plaintiff to proceed even when the statutory bond had not been paid can be found in Rogers v. City of Boston, 33 Mass. App. Ct., (1992). The Rogers Court found that when the Plaintiff "has made a good faith effort to present an offer of proof sufficient to meet the directed verdict standard", that person should be entitled to proceed with her case.

It was abuse of discretion on the part of the Judge to order the Plaintiff to file a bond of $1,500.00 as to each Defendant under the pursuit of claims provision of the statute stated the Supreme **[36]** Court in the Gugino case *supra*. The disposition in Gugino was as follows "the orders requiring the Plaintiff to file bonds

are to be vacated. A finding and decision are to be substituted therefor that upon the offer of proof presented by the plaintiff, including written reports and affidavits, the evidence thus offered and presented, if properly substantiated, is sufficient to raise a legitimate question of liability appropriate for judicial inquiry. The case is to be remanded to the Superior Court therein.

Regarding the motions for reconsideration filed in the instant case, the Court's attention is directed to two cases. In Chase Precast Corporation v. John J. Paonessa Company, Inc. et al, 409 Mass. 371 (1991) the Court spelled out a principal definition of "the law of the case" and states "where there have been no change of circumstances, a Court or Judge is not bond to reconsider an issue, or a question of law {in the same case}, once decided." Peterson v. Hopson, 306 Mass. 597, 599 (1940). However applied, the law of the case doctrine does not bind an Appellant Court to a ruling of law made **[37]** in a lower Court in case, even though that case may have been considered by the lower Court Judge who decided the case being appealed.

In the present case the record reflects the errors of the Judge. There was a change of circumstances. In the first motion for reconsideration the Plaintiffs' counsel submitted the $6,000.00 cash bond as previously ordered and in the second motion for reconsideration because of the Judge's obvious animosity towards Plaintiffs' counsel and for the sake of the Plaintiffs, Plaintiffs' counsel withdrew. Each motion for reconsideration presented a change. The Judges should have allowed the first and second motion for reconsideration.

In Bannister Jr. v. Commonwealth of Massachusetts, 411 Mass. 130 (1991), the Court held that it was within the discretion of the trial Judge to reconsider the monetary sanctions that a different Judge had imposed on a party for failure to comply with discovery requests.

In the present case on April 17, 2002, Judge Locke denied the second motion for reconsideration stating that "the instant motion, supported by **[38]** attachments does not set forth reasons sufficient to disturb the Court's previous rulings." The second Judge (Locke), actually the third Judge, clearly had a right to review both of the changes in circumstances, those being the payment of the monies required and the withdrawal of counsel. Both denials of the motions for reconsideration were abuses of discretion and errors of law on the part of the Trial Court.

The Plaintiffs contend that the application of the statutes that have imposed financial obstacles to the obtaining of access to the Courts violate their constitutional rights and deprive them of their due process. The financial obstruction that is the payment of the original $6,000.00 and the payment of the increased amount of $6,000.00 creates a financial obstruction to the institution of a medical malpractice suit. The unbridled discretion of the Judge to set the bond amount in the present case has been exercised unreasonably, prohibiting a meritorious claim which gives rise to a constitutional violation. The decision in the case of Damaskos v. Board of Appeal of Boston, 359 Mass. **[39]** 55, (1971) which upheld the requirement of the bond in an appeal of the zoning board of appeals was tempered by the Court's statement that the provision attached was intended to discourage frivolous appeals, but not intended to obstruct unreasonably those claims with merit. The Court held that the statute met constitutional standards as long as the judge exercised his discretion in setting the bond amount to accomplish these purposes.

In the present case, the Judge abused his discretion by requiring $12,000.00 for a case which could have passed muster at the tribunal and only for the purpose of punishing Plaintiffs' counsel rather than the Plaintiffs.

A number of cases have sustained due process challenges to statutes that presented financial obstacles to the filing of a civil suit, such as, Boddie v. Connecticut, 401 U.S. 371, 380-383, (1911).

The Plaintiffs suggest that they are subjected to a violation of Article 15 of the Massachusetts Declaration of Rights because they have been subjected to an unreasonable burden in order to proceed with a meritorious suit.

[40] In Paro v. Longwood Hospital, 373 Mass. 645 (1977) the Court held that

> "General Laws c. 231 Section 60B which requires that all actions alleging medical malpractice be presented to a tribunal charged with determining on a basis of an offer of proof made by the Plaintiff whether 'a legitimate question of liability appropriate for judicial inquiry' is presented and, on a finding that such a question does not exist in a Plaintiff's case imposing a bond on the Plaintiff as a condition for further prosecution, bears a rationale relationship to a proper legislative objective and does not deny a Plaintiff equal protection of the laws in that it neither subjects victims of other torts to such a procedure nor requires imposition of a bond on Defendants. The requirement of G.L. c. 231, Section 60B that, as a condition for further prosecution a bond be imposed on a Plaintiff whose medical malpractice claim is found to have no legal merit, does not violate due process of law; nor does it infringe on a Plaintiff's rights under Article 11 under Massachusetts Declaration of Rights; nor does the bond requirement impair the substance of a Plaintiff's right to a jury trial under

> Article 15 of the Massachusetts Declaration of Rights; nor does the tribunal procedure of c. 231, Section 60B abrogate any substantive right of recovery without providing a reasonable alternative. The tribunal procedure for medical malpractice suits established by the statute does not constitute a legislative obstruction to a judicial hearing in violation of Article 30 of the Massachusetts Declaration of Rights; nor does it violate Article 30 in allowing the two lay panel members to override the Judge since the Judge-member has the sole **[41]** responsibility of deciding purely legal questions."

The case at hand presents a novel issue because since the case was decided the idea of allowing a waiver of the tribunal by prepayment of a bond has evolved, however, the condition precedent for further prosecution remains. There does not need to be adjudication of the legal merit of the case and therefore in affect the "filing fee" to go forward with a malpractice case is a minimum of $6,000.00, plus the actual filing fee, plus an additional amount to be assessed at the whim of the Judge. The question then becomes, are these fees constitutional or do they violate Article 11, Article 15 and/or Article 30 of the Massachusetts Declaration of Rights and by extension the comparable rights guaranteed under the United States Constitution. We present this issue to the Court for resolution.

Furthermore, in the present case the Judge has made a third party unrelated to the negligence claims responsible for payment of the bond in order for the parties to go forward. In other words, the Judge has tied the hands of the Plaintiffs' ability to pursue **[42]** their meritorious claims dependent upon a third parties actions that have no claim at all against the

Defendants. This financial obstruction, the payment of $6,000.00 by Plaintiffs' counsel, the payment of which is ordered not to be passed on to the Plaintiffs, is in itself unconstitutional and a violation of the Plaintiffs' rights under Massachusetts Declaration of Rights and the United States Constitution.

This Court should provide the equal treatment protected by the Fourteenth Amendment to the Constitution because the legislatures standard in passing General Law Chapter 231, Section 60B and the Courts interpretations have denied the Plaintiffs their rights under Massachusetts Law and the Fourteenth Amendment under the United States Constitution.

Finally, the motion Judge failed to issue a comprehensive memorandum of decision in order to explain the reasons supporting the allowance of the motions to dismiss. Without a rationale apparent from the judgment below, the Plaintiffs appeal therefrom has been unduly hampered and this sparse **[43]** procedure does not comply with the spirit of G.L.c. 231, Section 60B.

CONCLUSION

For all the reasons identified herein, this Court should vacate and reverse the dismissal of the Complaint pursuant to G.L. Chapter 231, Section 60B and allow the Plaintiffs to proceed with an offer of proof to a medical malpractice tribunal to present written reports, hospital records, and medical testimony without bond or to proceed to trial with or without the assessment of the additional $6,000.00 bond; or provide the Plaintiffs with such other relief as is fair and just in the circumstances.

Respectfully submitted,
Orrie Tucker and
Catherine Tucker
THE APPELLANTS

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Dated: July 25, 2002

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

FAR No. _____

Appeals Court No.2002-P-461.

Middlesex County Division.

Orrie Tucker and Catherine Tucker,
Plaintiffs-Appellants,

v.

Metrowest Medical Center, f/k/a Framingham Union Hospital, and William S. George, M.D.,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT DEPARTMENT.

Application of the Plaintiffs-Appellants, Orrie Tucker and Catherine Tucker, For Leave To Obtain Further Appellate Review.

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[1] Request.

The Plaintiffs-Appellants Orrie Tucker and Catherine Tucker ("Tucker") hereby apply to this Honorable Court for leave to obtain further appellate review of the decision of the Appeals Court dated December 18, 2003, which affirmed summarily the Superior Court Department's dismissal with prejudice of their meritorious medical malpractice claims against the Defendants-Appellees based upon the gross oversights of their attorney in failing to post an increased bond in a timely manner and in failing to furnish defense counsel with an expert's letter about the defendants' liability when ordered to do so.

[2] Prior Proceedings.

On December 20, 2000, the plaintiffs-appellants Orrie Tucker and Catherine Tucker ("Tucker")filed a complaint against the defendants-appellees Metrowest Medical Center f/k/a Framingham Union Hospital ("Metrowest") and William S. George, M.D. ("Dr. George"), Orrie Tucker's Primary Care Physician, claiming both were negligent from on or about December 27, 1996, until November 22, 1997, in failing to diagnose Orrie Tucker's colon cancer thereby causing him personal injuries and resulting in a loss of consortium and emotional distress for his wife, Catherine Tucker.

Specifically, Tucker claimed that Metrowest and its employee, Dr. George, failed to treat and diagnose properly Orrie Tucker's presenting symptoms of bloody rectal discharge precipitated by an episode of diarrhea and vomiting in Metrowest's Emergency Room in December of 1996. Metrowest's Dr. Brown saw and examined Tucker and felt a large rectal polyp. A gastrointestinal consultation by another doctor at Metrowest (Dr. Bruce Marcel) recommended a stool culture as well as a sigmoidoscopy after Tucker was discharged from Metrowest. However, Dr.

[3] George, Orrie Tucker's Primary Care Physician and Metrowest's employee, did not follow up with the sigmoidoscopy or a stool culture and they were never performed.

Orrie Tucker was eventually readmitted to Metrowest in November of 1997 with a staphylococcal endocarditis which resulted in his immediate transfer to Brigham and Women's Hospital for emergency abdominal surgery for adenocarcinoma of the colon by intussusception of the colon and the removal of an eight (8) inch section of the colon requiring a colostomy. The post-operative diagnosis was that the intussusception was induced by a large polyp as the leading point with a carcinoma-in-situ in it. Orrie Tucker did well post-operatively and the colostomy was closed in a few months.

According to Tucker, routine and accepted medical practice dictated that Orrie Tucker's presenting symptoms in Metrowest's Emergency Room in December of 1996 of bloody rectal discharge precipitated by an episode of diarrhea and vomiting together with Dr. Marcel's consulting recommendation that a stool culture as well as a sigmoidoscopy be performed after Tucker was discharged, **[4]** required that Metrowest's Dr. George, as Tucker's Primary Care Physician and Metrowest's employee, perform a sigmoidoscopy and/or a colonoscopy. That he did not do so was the foundation of Tucker's claim that Metrowest and its employee, Dr. George, had deviated from the standard of care in the circumstances.

As Tucker eventually showed through expert proof, "[t]he intussusception would not have occurred had the proper follow up of the GI bleed been done because the polyp would not have been there to be a leading point. The colon resection and colostomy would not have been done and the associated discomfort and suffering would not have occurred"(A.127).

Both Dr. George and Metrowest answered by denying all of Tucker's allegations, asserting various

affirmative defenses and requesting a medical Malpractice Tribunal pursuant to G.L.c. 231, Section 60B. The Tribunal was convened on April 25, 2001, and Tucker's trial counsel, Ms. Roberta Golden, informed counsel for Dr. George and Metrowest that she would not submit an offer of proof but would post a $6,000 bond in order to continue the action. She did so that day and as a result, the Tribunal found that there was insufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry. Two days later, on April 27, 2001, Dr. George and Metrowest jointly moved to increase the amount of the bond consistent with *Denton v. Beth Israel Hosp.*, 392 Mass. 277(1984).

On June 28, 2001, the Superior Court Department, Zobel, J., heard the defendants' joint motion to increase the bond. He allowed the motion and set the bond at $12,000 but stayed its implementation until August 10, 2001, with a further hearing to be held at that time. This ruling was bottomed on Attorney Golden's representation to the Court that she had an expert letter regarding the defendants' liability in this matter but that it was not presently with her in court. Judge Zobel ordered Attorney Golden to fax the letter to the defendants' counsel by the close of that day(June 28, 2001).

Attorney Golden did not fax the undated expert's letter to the defendants' counsel until July 10, 2001. In addition, defense counsel subsequently learned from the expert (Dr. Charles Lipson) that he had not written his **[6]** report concerning the defendants' liability until July 5, 2001.

The hearing scheduled for August 10, 2001, was rescheduled for October 30, 2001. Judge Zobel was then informed by defense counsel of Attorney Golden's misrepresentation about the existence of the expert' s letter on June 28, 2001, and her subsequent failure to fax the letter to defense counsel until July 10, 2001. The lower court thereupon removed the stay of his previous order, increased the bond to

$12,000 and further ordered that Attorney Golden personally pay the additional $6,000 for the increased bond "within ten business days" and that it [n]ot be passed to the client"(*Addendum No. 4).*

With the additional bond of $6,000 not forthcoming from Attorney Golden by November 13, 2001, counsel for Dr. George and Metrowest jointly moved to dismiss Tucker's civil action based upon Attorney Golden's failure to comply with the Court's order. On November 21, 2001, Judge Zobel allowed the defendants' motion and entered an order dismissing Tucker's complaint against both Dr. George and Metrowest with prejudice.

Attorney Golden then filed the required additional **[7]** bond on December 13, 2001, and moved for a reconsideration of the dismissal of Tucker's claims. On January 11, 2002, Judge Zobel denied the motion. In a memorandum, the lower court wrote that

> the difficulties and delays this case has produced *are due entirely to the unexcused--indeed, unexcusable--conduct of Plaintiff's [sic] counsel....* A party is ordinarily entitled to a day in court, however obnoxious the lawyer's conduct. This right is nonetheless not unlimited. As between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant --put to unfair delay, expense, and uncertainty by plaintiff's counsel's shenanigans--the former should bear the consequences.

(A. 208-209) (*Addendum No. 4*) (emphasis supplied). Judgment accordingly entered on January 11, 2002.

After noticing an appeal from the judgment, Tucker, now represented by a new attorney, then filed a second motion for reconsideration. It sought the indulgence of the motion judge to give Tucker their

day in court in order to prove their meritorious claims against Dr. George and Metrowest. The motion was based upon Attorney Golden's withdrawal together with the appearance of new counsel, **[8]** the re-submission of the cash surety bond of $6,000 and the notion that Tucker should not now be penalized for the conduct of their prior counsel, Attorney Golden. On April 23, the Superior Court Department, Locke, J., denied Tucker's second motion for reconsideration.

Tucker appealed this judgment to the Appeals Court and on December 18, 2003, the intermediate appellate court in a rescript opinion issued under its Rule 1:28, summarily affirmed the decision of the Superior Court Department. *Orrie Tucker & another v. Metrowest Medical Center & another*, 60 Mass. App. Ct. 1108 (2003) (*Addendum No. 1*). In its memorandum, the Appeals Court ruled that Judge Zobel did not abuse his discretion in increasing the amount of the bond(*Id.* at 4). Moreover, when Attorney Golden then failed to pay the additional bond on time, it ruled that the lower court did not err "in allowing the defendants' motion to dismiss for failure to file the bond"(*Id.* at 4-5).

The Appeals Court further observed that the judge was not obligated to allow Tucker's motions for reconsideration "in view of the plaintiffs' attorney's dilatory actions" (*Id.* at 5, n. 6). As the Appeals Court ruled, **[9]** "[a]n enlargement of time is appropriate when the failure to file a bond is excusable neglect on the part of plaintiff's counsel, where there is 'no question of irregular behavior on the part of counsel or [her] seeking tactical advantage through any pretense.'" (*Id.* at 5 quoting *Goldstein v. Barron*, 382 Mass. 181, 186-187 (1980)). However, because Attorney Golden's conduct was more than mere excusable neglect and constituted "irregular behavior," this decisional law did not apply and the reconsideration motions were rightly denied (*Id.*)

Tucker has now filed this Application for Leave to Obtain Further Appellate Review by this Court.

[10] Statement of the Facts Relevant To This Application.

Besides the facts already identified in *Prior Proceedings, supra,* Tucker wishes to emphasize that there is no evidence whatsoever in this record that the *clients Orrie Tucker or Catherine Tucker* engaged in wilful or bad faith conduct. There is no evidence in the record that Tucker's conduct in any way formed a part of Judge Zobel's justification for ordering a dismissal of their complaint against Dr. George and Metrowest.

That is, Judge Zobel never found or ruled that the client Tucker engaged in wilful or bad faith conduct. In addition, Judge Zobel's rulings, indeed even Judge Locke's subsequent ruling, were based solely upon Attorney Golden's conduct, not her client's behavior. It was never found that Tucker knew about, condoned or otherwise approved of Attorney Golden's gross neglect in failing to secure in a timely manner the increased bond or in failing to produce the expert's letter on the defendants' liability as ordered to do so.

In fact, the only conclusion that can be drawn from this record is that Judge Zobel's decision was based **[11]** solely upon Attorney Golden's conduct in this matter. At no point in these proceedings did Judge Zobel expressly indicate or even imply that he considered Tucker's conduct as a factor in his rulings. Nor did he indicate in any way that his rulings were intended to sanction Tucker for their actions. Indeed, it is clear from the record that any culpable conduct was committed by Attorney Golden, *not* Tucker. There were no findings by Judge Zobel or Judge Locke of bad faith or misconduct on the part of Tucker and no evidence in the record that would justify such a finding by either judge.

[12] Statement of the Issues of Law For Which Further Appellate Review is Sought.

1. Should Tucker be punished by the most severe sanction of dismissal of their claims with prejudice for their attorney's egregious conduct in failing to secure the increased bond in a timely manner and in failing to produce the expert's letter when ordered to do so where they never knew about, condoned or otherwise approved of Attorney Golden's gross neglect?

2. Did Judge Zobel abuse his discretion in denying Tucker's first motion for reconsideration where Tucker never knew about, condoned or approved of Attorney Golden's gross neglect?

3. Did Judge Locke abuse his discretion in denying Tucker's second motion for reconsideration brought by successor counsel where Tucker never knew about, condoned or approved of their former attorney's inexcusable and gross neglect and where it was shown that Attorney Golden had withdrawn her appearance for Tucker?

[13] Argument on the Issues of Law For Which Further Appellate Review Is Sought.

Substantial reasons affecting the public interest and the interests of justice support the allowance of Tucker's application for leave to obtain further appellate review of the Appeals Court's summary decision upholding the Superior Court Judge's dismissal of their complaint and the subsequent refusals to reconsider that filing.

Most actions taken by a party's legal representative in the course of litigation are rightly imputed to that party since one who decides to incur the expenses of retaining a lawyer should be able to rely on that lawyer to tend to the legal business at hand in a manner consistent with his interests. The presumption is that the client has notice of all facts

known to his lawyer agent; and even the negligence of the party's attorney will be imputed to that party.

However, when the negligence of the attorney in prosecuting an action threatens to terminate the litigation prematurely, the courts of the Commonwealth while imputing this negligence to the party, have been **[14]** reluctant to deprive him of a trial on the merits of his claims. In those cases where the negligence has been merely "technical" or "excusable," the most severe sanction of dismissal has been held to be too punitive to impose upon a faultless client. In other cases where the attorney's negligent acts or omissions were neither technical nor excusable, such negligence has been imputed to the party and dismissal of the party's action has been upheld.

However, in the unusual circumstance where an attorney's conduct in the course of litigation reaches the dimensions of gross neglect or egregious conduct, and there is an absence of any neglect by the party, there is no justifiable reason in law to impute such egregious conduct to the party at all and thereby deprive him of his day in court on his legitimate claims. Here, it was never found that Tucker knew about, condoned or otherwise approved of Attorney Golden's gross neglect in failing to secure an a timely manner the increased bond and in failing to produce the expert's letter on the defendants liability when ordered to do so.

In addition, Judge Zobel's rulings, indeed even Judge Locke's subsequent ruling, *were based solely upon* **[15]** *Attorney Golden's conduct, not her client's behavior.* As Judge Zobel wrote,

> the difficulties and delays this case has produced are due entirely to the unexcused--indeed, inexcusable--conduct of Plaintiff's [sic] counsel....

At no point in these proceedings did Judge Zobel expressly indicate or even imply that he considered Tucker's conduct as a factor in his rulings. Nor did he indicate in any way that his rulings were intended to sanction Tucker for their actions. There were no findings by Judge Zobel or Judge Locke of bad faith or misconduct on the part of Tucker and no evidence in the record that would justify such a finding by either judge.

In these circumstances, the lower court abused its discretion by imposing upon Tucker the most severe sanction in its arsenal of punishment, i.e., dismissal of their complaint with prejudice, for the conduct of their attorney in the prosecution of this case, gross neglect which Tucker never knew about, condoned or approved. Having demonstrated upon their motions for reconsideration that all of the factors attendant to such a decision militated in favor of the allowance of such relief, including the notion that they should not be punished for the gross mistakes of their attorney, Tucker **[16]** deserved to have their day in court on their claims. Judge Zobel and Judge Locke's refusal to provide them this opportunity was therefore an abuse of discretion.

The Appeals Court's summary affirmance of the dismissal ignored the substantive law which argues against imputing this *gross* neglect to the faultless client Tucker and wrongly treated this case as one involving the commission of mere negligence by an attorney when, in fact, Judge Zobel decided the case on conduct which he characterized as more aggravated than plain negligence.

This Court should allow Tucker's Application and take this opportunity to reexamine and, if necessary, redefine the kind of negligence by an attorney which will be imputed to a client for purposes of punishing that client with dismissal for its commission. It should then reverse and vacate the judgment below and remand this matter to the Superior Court

Department for further discovery and an eventual trial.

This Court will treat Tucker's successive motions for reconsideration below as if labeled consistently with its obvious purpose, i.e., as if brought under Mass. R. Civ. P. 60(b)(1) or (6), or both. *Stilian v. GTC Corporation*, 17 Mass. App. Ct. 953(1983). *Mullen Lumber Com-* **[17]** *pany, Inc. v. F.P. Associates, Inc.*, 11 Mass. App. Ct. 1018, 1019(1981). Like any Rule 60(b) motion, Tucker's motions for reconsideration were addressed to the sound discretion of the judge; *Bird v. Ross*, 393 Mass. 789, 790-791(1985); *Parrell v. Keenan*, 389 Mass. 809,815 (1983); Anderson *v. Goodman*, 341 Mass. 704, 705(1961), and his ruling will not be reversed except for an abuse of that discretion. *Bird*, 393 Mass. at 791. *Parrell, supra.*

In *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 430-431 (1979), the Appeals Court identified various factors which help a reviewing court measure the exercise of the motion judge's discretion when ruling upon a motion for reconsideration. The most immediate factor for this case, based upon Judge Zobel's rationale for refusing to reconsider his dismissal of Tucker, s claims, is whether the error or oversight is or ought to be chargeable to the legal representative rather than to the party himself. *Id.* at 431.

While the *Berube* Court recognized there is respectable authority for the proposition that, except under extraordinary circumstances, a lawyer's negligence should not be found excusable and should be attributed to the party, it also noted that "courts have been reluctant **[18]** to attribute to the parties the errors of their legal representatives." *Id.* at 431 & n.10 quoting *Barber v. Tuberville*, 218 F.2d 34, 36(D.C. Cir. 1954) and citing *Maki v. New York, New Haven & Hart. R.R. Co.*, 293 Mass. 223-224 (1936). As it observed in affirming the allowance of a motion for relief from a judgment of dismissal, a hard and fast rule which makes a party responsible for his attorney's

oversights will not lessen trial congestion but rather replace the dismissed cases with new actions for malpractice against the negligent attorneys. *Id.* at n.10. Perhaps for this reason, the Court took notice of the federal circuit courts of appeal which have taken a liberal attitude toward granting relief from judgments. Id.

Building upon these observations in *Berube*, the Court in *Mullen Lumber Company, Inc. v. F.P. Associates, Inc.*, 11 Mass. App. Ct. at 1019 and *Wilkinson v. Guarino*, 19 Mass. App. Ct. 1021, 1023 (1985), permitted relief from judgments entered because of an attorney' s missteps since punishing a party for the oversights of his counsel by denying him a trial on the merits of his complaint "will do little to enhance public perception of the civil justice system and may well precipitate additional litigation in the form of a malpractice action against that **[19]** lawyer." *Mullen, supra. Wilkinson, supra.*

In contrast, it is only when the *party himself* is negligent or careless in his own prosecution of the case acting *pro se* or otherwise that the oversight is attributable to him. *Bird v. Ross*, 393 Mass. at 790(neglect was the defendant's own). *Murphy v. Administrator of Div. of Personnel Adm.*, 377 Mass. 217,228 (1979) (defendant's own carelessness caused judgment). *Alpert v. Mercury Publishing Co.*, 272 Mass. 43,45 (1930) (defendant's own neglect caused judgment). This is not the situation here.

Besides this law, *Berube's* observation that, "except under extraordinary circumstances," 7 Mass. App. Ct. at 431, a lawyer's negligence should hot be found excusable and should be attributed to the party finds expression in the distinction made by the federal circuit courts between mere negligence and gross negligence committed by an attorney. Five federal circuit courts of appeals together with two federal circuits have agreed that an attorney's gross and inexcusable conduct, like the conduct here described by Judge Zobel, is precisely the kind of "extraordinary

circumstance" for which a faultless and unknowing client should *not* be held responsible and that relief from a judgment entered for **[20]** this reason should be allowed in order to give a party his day in court. *Greenspan v. Bogan*, 492 F.2d 375, 382(1st Cir. 1974). *Carter v. Albert Einstein Med. Ctr.*, 904 P.2d 805, 806(3rd Cir. 1986). *In re Virginia Info. Sys. Corp.*, 932 F.2d 338, 342 (4th Cir. 1991). *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F. 2d 190,195(6th Cir. 1986).*Community Dental Services v. Tani*, 282 F.3d 1164, 1168-1169 (9th Cir. 2002). *L.P. Stewart, Inc. v. Matthews*, 329 F.2d 234, 235(D.C. Cir. 1964). *Primbs v. United States*, 4 Ct. Cl. 366, 370(1984). See also *King v. Mordowanec*, 46 F.R.D. 474, 477-478(D. R.I. 1969).

The combination of *Berube's* language and its rationale together with these persuasive federal precedents directly addressing the effect of an attorney's *gross* neglect in the prosecution of a civil action ought to prompt this Court to reexamine and redefine the kind of negligence by an attorney which will be imputed to a client for the, purposes of punishing that client with dismissal of his complaint for its commission. Put simply, Judge Zobel's calculus for imposing upon the client Tucker the most severe sanction of dismissal for the gross negligence and egregious conduct of their attorney must be reevaluated by this Court.

[21] *Berube's* other factors warrant this reexamination. See 7 Mass. App. Ct. at 430-431. The degree of prejudice to each of the respective parties caused by the allowance of the motion weighs favorably in Tucker's favor. Tucker is forever barred from raising these claims again; the judgment entered with prejudice has full preclusive effect, *Riehle v. Margolies*, 279 U.S. 218, 225 (1929); Osserman *v. Jacobs*, 369 Mass. 200, 203-204(1975), "with a harshness totally disproportionate to the wrong, if any, suffered by [Dr. George and Metrowest]." *Feeney v. Abdelahad*, 6 Mass. App. Ct. 849, 850 (1978). See

Ticchi v. Ambassador Cab, Inc., 11 Mass App. Ct. 912 (1981) (judgment against the defendant is "too severe under these circumstances..."); *Mullen Lumber Company, Inc. v. F.P. Associates, Inc.*, 11 Mass. App. Ct. at 1020.

As far as Tucker's conduct is concerned, they expeditiously sought relief from the judgment as soon as it entered; and they continued to seek relief by motions for reconsideration as soon as the reasons for the entry of the judgment became apparent. See *Mullen*, 11 Mass. App. Ct. at 1019-1020. There can be no inference on this record that before or after judgment had entered, the client Tucker engaged in any conscious strategy designed to frustrate and impede the progress of litigation. Com- **[22]** pare *Kenney v. Rust*, 17 Mass. App. Ct. 699, 703-704 (1984); *Berube*, 7 Mass. App. Ct. at 432.

Finally, Tucker has meritorious claims against Dr. George and Metrowest on this record. A meritorious claim means "one worthy of judicial investigation because [it] raise[s] a material question of law meriting discussion and decision, or a real controversy as to essential facts arising from conflicting or doubtful evidence." *Russell v. Foley*, 278 Mass. 145,148(1932). *Mullen*, 11 Mass. App. Ct. at 1020. According to Tucker, accepted medical practice dictated that Orrie Tucker's presenting symptoms of bloody rectal discharge precipitated by diarrhea and vomiting together with Dr. Marcell's consulting recommendation that a stool culture as well as a sigmoidoscopy be performed after Tucker was discharged, required that Dr. George, as Tucker's Primary Care Physician and Metrowest's employee, perform a sigmoidoscopy and/or a colonoscopy. That he did not do so was the foundation of Tucker's claim that Metrowest and its employee, Dr. George, had deviated from the standard of care in the circumstances. These legitimate claims by Tucker deserved to be heard by a jury rather than dismissed

with prejudice because of their attorney's egregious and inexcusable conduct.

[23] Conclusion.

For all of the reasons identified herein, this Court should allow Tucker' s application for leave to obtain further appellate review, enter an order vacating the judgment below and remanding the matter to the Superior Court Department for a jury trial of Tucker's claims and/or providing him with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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